No. 84-1274

# In the Supreme Court of the United States

OCTOBER TERM, 1984

---

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM, PETITIONER

*v.*

DIMENSION FINANCIAL CORPORATION, ET AL.

---

*ON WRIT OF CERTIORARI TO THE*
*UNITED STATES COURT OF APPEALS*
*FOR THE TENTH CIRCUIT*

---

## BRIEF FOR THE PETITIONER

---

MICHAEL BRADFIELD
*General Counsel*

JAMES V. MATTINGLY, JR.
*Deputy General Counsel*

RICHARD M. ASHTON
*Associate General Counsel*

KEVIN J. HANDLY
*Attorney*

*Board of Governors of the*
*Federal Reserve System*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## QUESTION PRESENTED

Section 2(c) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(c)) defines a "bank" as any institution that "(1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." The question in this case is whether, in order to prevent evasion of the Act through manipulation of this definition, the Federal Reserve Board properly exercised its discretion in determining that the first element of this definition includes NOW (negotiable order of withdrawal) checking accounts and that the commercial loan element includes the purchase of commercial paper, retail installment loans, and similar instruments, which result in extensions of credit to commercial enterprises.

## PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Daniel T. Carroll, Harold D. Dufek, William T. Mitchell, Ronald L. Shaffer, A. Gary Shilling, the State of Ohio, Ohio Division of Savings and Loan Associations, Ohio Deposit Guaranty Fund, Horizon Savings and Loan Company, Permanent Savings and Loan Association, Financial Institutions Assurance Corporation, First Bancorporation, Colorado Industrial Bankers Association, Fort Lupton Industrial Bank, Monroe Industrial Bank, Castle Rock Industrial Bank, Ark Valley Industrial Bank, Household Lamar Industrial Bank, Household Alamosa Industrial Bank, Household Valley Industrial Bank, Household Salida Industrial Bank, Copper State Thrift & Loan Company, and Copper State Financial Corporation were petitioners in the court of appeals. American Financial Services Association and Household Finance Corporation were intervenors in the court of appeals.

## TABLE OF CONTENTS

TABLE OF CONTENTS—Continued





TABLE OF AUTHORITIES

Cases: Page

TABLE OF AUTHORITIES—Continued





TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued





TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued





TABLE OF AUTHORITIES—Continued

# In the Supreme Court of the United States

OCTOBER TERM, 1984

---

No. 84-1274

---

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM, PETITIONER

*v.*

DIMENSION FINANCIAL CORPORATION, ET AL.

---

*ON WRIT OF CERTIORARI TO THE*
*UNITED STATES COURT OF APPEALS*
*FOR THE TENTH CIRCUIT*

---

## BRIEF FOR THE PETITIONER

---

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 744 F.2d 1402.

### JURISDICTION

The judgment of the court of appeals was entered on September 24, 1984. On December 13, 1984, Justice White extended the time for filing a petition for a writ of certiorari to January 22, 1985. On January 14, 1985, Justice White further extended the time for filing to and including February 6, 1985. The petition was filed on that date and was granted on April 29, 1985. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

12 U.S.C. 1841(c) provides in relevant part:

> "Bank" means any institution * * * which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans.

12 C.F.R. 225.2(a)(1) provides:

> "Bank" means any institution organized under the laws of the United States that
>
> (i) accepts deposits that the depositor has a legal right to withdraw on demand and
>
> (ii) engages in the business of making commercial loans. For the purposes of this definition
>
> (A) "deposits that the depositor has a legal right to withdraw on demand" (hereinafter "demand deposits") means any deposit with transactional capability that, as a matter of practice, is payable on demand and that is withdrawable by check, draft, negotiable order of withdrawal, or other similar instrument; and
>
> (B) "commercial loans" means any loan other than a loan to an individual for personal, family, household, or charitable purposes, and includes the purchase of retail installment loans or commercial paper, certificates of deposit, bankers' acceptances, and similar money market instruments, the extension of broker call loans, the sale of federal funds, and the deposit of interest-bearing funds.

## STATEMENT

1. The Bank Holding Company Act of 1956 (BHC Act or Act) establishes a comprehensive federal framework governing the banking and nonbanking activities and acquisitions of bank holding companies in order to effectuate the national policies requiring a separation of



banking and commerce in this country and maintaining local control over banking expansion across state borders. *Northeast Bancorp* v. *Board of Governors*, No. 84-363 (June 10, 1985), slip op. 2; *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 38, 46 (1980). The Act charges the Federal Reserve Board with exclusive authority to administer the Act and to issue such orders or regulations as may be necessary to enable it to carry out the purposes of the Act and to prevent evasions thereof. 12 U.S.C. 1844(b).

The scope of coverage of the Act is determined by the Act's key definition of "bank" as "any institution * * * which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans."[1] 12 U.S.C. 1841(c). The term "bank holding company," in turn, means "any company which has control over any bank." 12 U.S.C. 1841(a)(1).

Section 3 of the BHC Act requires prior Board approval for the formation and expansion of bank holding companies through acquisitions of banks, under specified competitive, financial, managerial, and community convenience and needs factors. 12 U.S.C. 1842(a) and (c). Section 3(d) of the Act, known as the "Douglas Amendment," prohibits the Board from approving any application by a bank holding company to acquire a bank located in another state without the consent of the state. 12 U.S.C. 1842(d). Section 4 of the Act (12 U.S.C. 1843(a), (c)(8)) prohibits bank holding companies from engaging in activities other than those of banking or managing or controlling banks and activities the Board

---

[1] Section 2(c) excepts from this definition of "bank" federal savings banks and federal savings and loan associations and state savings and loan associations and similar thrift institutions the accounts of which are insured by the Federal Savings and Loan Insurance Corporation. 12 U.S.C. 1841(c). Companies controlling such institutions are subject to the Savings and Loan Holding Company Act. 12 U.S.C. 1730a.

determines to be "closely related to banking." In order to authorize a bank holding company to engage in such an activity, the Board must find that the expected public benefits of the activity outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interest, or unsound banking practices. 12 U.S.C. 1843(c)(8). See *Securities Industry Association* v. *Board of Governors*, No. 83-614 (June 28, 1984), slip op. 2-3. Bank holding companies are subject to registration and reporting requirements as well as to the broad examination, supervisory, and enforcement powers of the Board. 12 U.S.C. 1844(c), 1847, 1818(b)(3).

2. The issue in this case is the applicability of this regulatory framework to companies controlling so-called "nonbank banks"—national and state chartered banks, industrial loan companies, and similar institutions that seek to escape treatment as a bank under the Act by claiming not to offer one of the two services that define a bank for purposes of the Act, while offering a functionally equivalent service.

In several isolated cases in the period from 1970 to early 1981, the Board and its staff issued advisory letters that tended to narrow the scope of the commercial loan element of the bank definition (J.A. 93A-105A, 110A-112A). By 1982, however, advances in computer and communications technology and inflation, among other reasons, had generated a major thrust by commercial firms into banking and by industrial banks into NOW (negotiable order of withdrawal) checking accounts and commercial lending services. A NOW account is an interest-bearing checking account that is subject to a theoretical, never-exercised, right of the depository institution to require prior notice of withdrawal from the account and is available generally only to individuals. Similarly, bank holding companies have sought to expand their banking activities geographically across state lines.



Nonbank banks developed as the vehicles by which these nonbanking and banking companies sought entry into or an expansion within the banking system (see Pet. App. 24a, 31a).

The Board's response to the proliferation of nonbank banks evolved in three steps, from decisions made in two specific cases to a general rule adopted after rulemaking proceedings. First, in April 1982, prompted by the expansion in the late 1970's and early 1980's of NOW account and commercial loan powers for industrial banks (Pet. App. 24a, 42a), the Board interpreted the demand deposit element in the BHC Act's definition of bank to include NOW accounts.[2]

Second, when in December 1982, a major securities firm acquired a state chartered, federally insured nonbank bank (J.A. 71A-89A), it became evident that many more commercial firms and bank holding companies would utilize the nonbank bank device to avoid the Act's policies. It also became clear to the Board that a liberal construction of the bank definition that permitted such acquisitions would, contrary to the intention of Congress, result in significant evasions of the basic purposes of the BHC Act by allowing combinations of commercial and banking firms that would inevitably raise the potential hazards that Congress sought to prevent by the adoption of the BHC Act (Pet. App. 24a-25a). Accordingly, to limit the use of the nonbank bank device as a means to avoid coverage of the Act, the Board interpreted the term commercial loans as used in the Act's bank definition to in-

[2] The Board approved the acquisition by respondent First Bancorporation of a Utah chartered industrial loan company on condition that the industrial loan company not engage both in making commercial loans and accepting NOW accounts, which the Board concluded must be regarded as demand deposits for purposes of the Act. *First Bancorporation (Beehive Thrift and Loan Co.)*, 68 Fed. Res. Bull. 253 (1982) (J.A. 59A-64A).

clude the purchase of commercial paper and similar money market instruments.[3]

Third, in May 1983, in response to the increase in the number of nonbank banks (Pet. App. 25a), the Board proposed for public comment an amendment to Regulation Y (12 C.F.R. Part 225) that would incorporate these interpretations (R. 203, 256).[4]

On December 30, 1983, after careful consideration of the comments received, the Board adopted, with only minor modifications, the proposed definitions of demand deposits and commercial loans, acting pursuant to its authority under section 5(b) to issue regulations to carry out the purposes and prevent evasions of the Act (Pet. App. 20a-22a, 61a). In a detailed Appendix accompanying the revised regulation (*id.* at 20a-61a), the Board reaffirmed its belief that the definitions are necessary to prevent the threatened nullification of the fundamental purposes of the BHC Act caused by the growing wave of acquisitions of nonbank banks (*id.* at 21a-31a).

The Board further stated, after reviewing the legislative history of the Act's definition of bank, that Congress intended the provisions of the bank definition concerning the taking of demand deposits and the making of commercial loans to exclude only limited classes of entities, such as savings banks and trust companies, whose activities were narrowly confined by law (Pet. App. 22a-

[3] In opposing before the Federal Deposit Insurance Corporation the proposed acquisition by the Dreyfus Corporation, an organization engaged in the underwriting of securities, of an FDIC-insured state chartered nonbank bank, the Board determined that the term "commercial loans" as used in the definition of "bank" includes the purchase of money market instruments, such as commercial paper, bankers' acceptances and similar lending vehicles (J.A. 65A-70A).

[4] The proposed definitional provisions were part of a proposed comprehensive revision of Regulation Y, which implements the BHC Act (R. 208).



24a).[5] The Board found, however, that after 1980 the powers of industrial banks substantially expanded to include accepting NOW checking accounts and making commercial loans, and these institutions became eligible for FDIC insurance (*id.* at 24a). The Board also found that the recent widespread acquisition of FDIC-insured national or state banks by insurance, securities, industrial, and commercial organizations, based upon their narrow construction of the Act's definition of bank, frustrated the framework of regulation created by the Act (*id.* at 24a-27a). In particular, the Board determined that the combination of nonbank banks with commercial and industrial enterprises, free of the protections of the Act, could give rise to precisely the kind of preferential and abusive credit practices the Act was meant to abolish (*id.* at 28a-31a). The Board also made clear that the proliferation of nonbank banks permits "expansion of banking across state lines without either state authorization or Congressional approval as is now required by law" (*id.* at 31a).

With respect to the proposed definitions, the Board noted that "NOW accounts in practice perform the same function as conventional demand deposits, are advertised and used in a manner indistinguishable from conventional bank checking accounts, and are subject to the same reserve requirements as conventional demand deposits" (Pet. App. 38a). The Board found that the imposition of a prior notice requirement would be a virtual practical impossibility with respect to NOW accounts (*id.* at 39a-40a).[6] The amended Regulation Y ac-

[5] The Board noted that, as originally enacted, the BHC Act defined bank as any national or state bank, savings bank, or trust company. In 1966, Congress eliminated the charter test in favor of a functional demand deposit test in order to exclude industrial and savings banks that then did not accept checking accounts. In 1970, Congress added the requirement that a bank that accepted demand deposits must also be in the business of making commercial loans, in order to exempt possibly only a single trust company (*id.* at 22a-23a).

[6] By invoking the notice requirement, the institution would refuse payment to the third party payee of the NOW account check,

cordingly defines "deposits that the depositor has a legal right to withdraw on demand" (12 U.S.C. 1841(c)(1)) to mean:

> any deposit with transactional capability that, as a matter of practice, is payable on demand and that is withdrawable by check, draft, negotiable order of withdrawal, or other similar instrument * * *.

12 C.F.R. 225.2(a)(1)(A).[7] The Board also found that the purchase of money market and similar instruments represents the provision of short-term funds "to commercial organizations * * * for working capital or current operations" (Pet. App. 48a-49a). The regulation accordingly defines "commercial loans" (12 U.S.C. 1841(c)(2)) to mean:

> any loan other than a loan to an individual for personal, family, household, or charitable purposes, and includes the purchase of retail installment loans or commercial paper, certificates of deposit, bankers' acceptances, and similar money market instruments, the extension of broker call loans, the sale of federal funds, and the deposit of interest-bearing funds.

12 C.F.R. 225.2(a)(1)(B). The regulation thus includes as a bank within the meaning of the BHC Act any institution that offers the NOW checking account form

---

and presumably such payees "would thereafter refuse to accept NOW drafts drawn on that institution" (*id.* at 39a, 40a & n.22). The impracticability of requiring prior notice of withdrawal is heightened by the fact that under federal law, if the notice is invoked, it must be required for withdrawals from every other account at the institution subject to the same notice of withdrawal provisions. *E.g.*, 12 C.F.R. 217.5(a).

[7] The Board noted that other types of transaction accounts, such as telephone transfer accounts and accounts accessible through automated teller machines, also might fall within the definition (Pet. App. 43a), but explained that "it is unlikely that there would be a significant number of depository institutions offering these accounts that do not also offer NOW or other checking accounts" (*ibid.*). The principal focus of the Board's ruling therefore was on NOW accounts (see *id.* at 32a-45a).



of demand deposits and makes commercial loans or that accepts demand deposits and makes commercial loans in any form, including purchases of short-term commercial debt obligations.

3. After the promulgation of amended Regulation Y, respondents filed petitions challenging the regulation in the Fourth, Sixth and Tenth Circuits. These petitions all were transferred to the Tenth Circuit pursuant to 28 U.S.C. 2112(a). That court then invalidated both the demand deposit and the commercial loan aspects of the Board's regulation (Pet. App. 19a).

a. Concerning the demand deposit definition, the court of appeals relied entirely (Pet. App. 4a) on its earlier decision in *First Bancorporation* v. *Board of Governors*, 728 F.2d 434 (1984). In that decision, the court of appeals overturned the Board's earlier ruling (see n.2, *supra*) that NOW accounts offered by a Utah industrial loan company that also made commercial loans must be regarded as demand deposits within the meaning of the BHC Act's definition of bank. In reaching its conclusion, the court in *First Bancorporation* noted that, under Utah law, industrial loan companies must reserve the right to demand 30 days' notice prior to the withdrawal of funds from a NOW account. 728 F.2d at 435. As a result, the court summarily concluded, a depositor whose funds are held by a Utah industrial loan company has "no legal right of withdrawal on demand" (*id.* at 436). The court also concluded that the statutory language must be interpreted narrowly because Congress used the "legal right to withdraw" formula rather than a broader "payable on demand" test that had been suggested by the Board (*id.* at 436-437). The court reached its conclusion without examining the Board's ruling in light of the underlying purposes of the Act.

b. On the commercial loan definition, the court below first explained that "the new definition of [commercial loans] is not in accord with common usage" (Pet. App. 8a), and that the Board in the past had ruled that an

institution may engage in money market transactions without subjecting itself to treatment as a bank (*id.* at 5a-6a). "Such a complete change [in position]," the court opined, "and one that is a redefinition and expansion of jurisdiction by an agency requires that different standards be met than are demanded in a typical administrative redefinition not involving such elements" (*id.* at 9a). The court also found support for its holding in the legislative history, concluding that the commercial loan proviso was added to the statute specifically to exempt from the Act only one institution, the Boston Safe Deposit & Trust Company; yet when the proviso was added, the court stated, Congress and the Board knew that the company was engaging in money market transactions of the sort that revised Regulation Y now treats as commercial loans (*id.* at 10a-11a). The court also noted that other federal agencies have disagreed with the Board's definition of commercial loan (*id.* at 7a, 17a).

Finally, with no analysis of the basic objectives of the Act, the court of appeals opined that the Board "does not have the broad scope to work in as do many other agencies. * * * Instead, the BHC [Act] limits the subject matter of the Board's functions basically to anticompetitive considerations" (Pet. App. 12a). In combination with the other factors noted above, this consideration led the court to hold that "the limited authority of the Board [does not] permit[] it to itself bring about the change here attempted and a change in its own jurisdiction no matter how necessary it perceives the change to be * * *" (*id.* at 17a). The court of appeals therefore broadly enjoined the Board from implementing or enforcing the revised Regulation Y (*id.* at 19a).

## SUMMARY OF ARGUMENT

The Bank Holding Company Act embodies the fundamental national policies that Congress has established to govern the companies that own or control banks. These policies require a separation of banking and commerce in



order to maintain banks as impartial providers of credit, to avoid conflicts of interest, unfair competition, undue concentration of resources, and the transmission of unregulated financial risks to the banking system, as well as to maintain local control over banking expansion across state boundaries. See *Northeast Bancorp*, slip op. 2; *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. at 38, 46. The issue in this case is the applicability of the Act to companies that seek to secure the benefits of affiliation with a bank, while avoiding these policies through ownership of so-called "nonbank banks."

Nonbank banks, although chartered as banks or similar deposit-taking institutions, claim exemption from the Act because they either do not offer deposits that the depositor has a legal right to withdraw on demand ("demand deposits") or do not make commercial loans —the two banking services that define a bank under the Act. 12 U.S.C. 1841(c). In many cases, however, the nonbank banks continue to offer a functionally equivalent service in the form of NOW (negotiable order of withdrawal) accounts (checking accounts that are subject to a never-exercised prior notice of withdrawal requirement) or the purchase of comercial paper and similar instruments that represent an extension of credit to a commercial organization.

In view of the rapid proliferation of nonbank banks in the early 1980's and the Board's findings that these institutions create a significant potential for evasion of the Act, the Board in December 1983, promulgated regulations aimed at identifying situations in which the ownership of a nonbank bank constitutes a prohibited evasion of the Act. For this purpose, the Board defined the demand deposit element of the Act's bank definition as including the functionally equivalent NOW account and the commercial loan element as including the purchase of money market instruments such as commercial paper, bankers' acceptances, and similar transactions. 12 C.F.R. 225.2(a)(1)(A) and (B).

The definitions established by the Board are based on the Board's conclusion that the fundamental objectives of the BHC Act would be substantially undermined through the acquisition of nonbank banks that offer NOW accounts and make commercial loans, or that take conventional demand deposits and purchase money market instruments that amount to commercial lending. The ability of a commercial, securities, insurance or industrial company to acquire a bank exercising these powers produces the very type of combinations of banking and commerce the BHC Act is intended to prevent. The nonbank bank device allows these companies to escape the comprehensive regulatory framework Congress established for companies that own banks, including important safety and soundness, anti-tying, conflicts of interest, concentration of resources, and insider lending provisions designed for the protection of the banking system and the public interest.

In addition, the nonbank bank device allows bank holding companies, as well as nonbanking companies, to acquire banks on an interstate basis without regard to provisions of the Act prohibiting interstate acquisitions of banks (as defined in the Act) without the host state's approval. 12 U.S.C. 1842(d). Such acquisitions of nonbank banks are in direct contravention of the policy of the Act to maintain local control over banking within state borders.

The separate legislative histories of both the demand deposit and commercial loan elements of the Act's bank definition, which were added in 1966 and 1970, respectively, do not indicate a congressional intent to allow a major departure from the overall regulatory and supervisory framework established for bank holding companies through the creation of a new class of exempt depository institutions. Rather, the intent in 1966 was to exempt small, localized industrial and savings banks that dealt with individuals as savers and borrowers and that did not offer checking accounts or commercial banking services, and in 1970 to exclude institutions exercising limited trust functions, in fact, perhaps, only a single institution. S. Rep. 1179, 89th Cong., 2d Sess. 7 (1966); H.R. Rep. 1747, 91st Cong., 2d Sess. 23 (1970).



The nonbank banks that now seek to take advantage of the changes in the bank definition adopted in 1966 and 1970 are not the same type of institutions that Congress intended to exclude. Industrial banks, such as the respondents in this case, have now obtained authority to offer NOW checking accounts and commercial lending services (Pet. App. 24a and 42a). The over sixty nonbank banks that are listed in the Appendix, *infra*, are mainly owned by large commercial, industrial, securities, and insurance firms engaged in a wide variety of businesses prohibited to banking organizations, and do not in the main limit their activities to trust and other fiduciary services, the basis upon which Congress added the commercial loan element to the bank definition in 1970. In these circumstances, it strains credulity to accept the notion put forward by respondents that Congress, without debate or discussion, by its 1966 and 1970 Amendments to the Act, intended to overturn the rules it was simultaneously establishing to apply comprehensive limits on the combination of banking and commercial activities and on interstate banking expansion without specific state approval.

Because the growth of nonbank banks will plainly frustrate the purposes for which the BHC Act was adopted, the Board, contrary to the view of the court of appeals below, acted appropriately and within its express authority to adopt regulations as necessary to carry out the purposes and prevent evasion of the Act, in promulgating the challenged demand deposit and commercial loan regulations.

A.

The inclusion of NOW accounts within the scope of demand deposits is entirely consistent with the legislative history and terms of the BHC Act and is necessary to carry out the Act's purposes.

NOW accounts function as the equivalent of conventional demand deposit checking accounts because they are freely withdrawable by check and because the notice of withdrawal requirement is not, and cannot practicably be, exercised. The legislative history of the Act shows unmistakably that Congress meant the "legal right to withdraw on demand" language in the bank definition to cover institutions that accept checking accounts. Congress utilized this terminology not because it intended the legal rights of depositors to be decisive, but because it wished to cover "checking accounts * * * the commonly accepted test of whether an institution is a commercial bank." S. Rep. 1179, 89th Cong., 2d Sess. 7 (1966). The "legal right to withdraw on demand" terminology designated the only type of checking account then in existence. This provision was intended to exclude industrial banking companies and similar organizations because they did not accept checking accounts and provided essentially savings accounts and consumer-oriented services. See 112 Cong. Rec. 12385-86 (1966). The only other court of appeals that has interpreted the demand deposit element of the bank definition recognized that Congress was not concerned with the legal rights of depositors, but with the functional nature of the deposit. *Wilshire Oil Co.* v. *Board of Governors*, 668 F.2d 732, 739 (3rd Cir. 1981), cert. denied, 457 U.S. 1132 (1982).

In addition, NOW accounts fall within the literal language of the bank definition because a NOW account depositor in fact has a legal right to withdraw funds from the account until the prior notice of withdrawal requirement is actually invoked. Because funds are withdrawn from NOW accounts by checks given directly to



third party payees, requiring prior notice of withdrawal with respect to a NOW account is practicably impossible [8] and would defeat the very purpose of NOW accounts—to operate as demand checking accounts. Indeed, in recognition of the impracticability of ever invoking notice of withdrawal on NOW accounts, these instruments are treated in calculating the nation's money supply for monetary control purposes identically to currency and demand deposits. See, *e.g.*, 71 Fed. Res. Bull. A3 n.4 (July 1985).

Finally, the Board's coverage of NOW accounts as demand deposits is necessary to prevent evasion of the Act in view of the functional equivalency of the two accounts. Since NOW accounts and conventional demand deposits are operationally equivalent, a corporate parent may escape the Act by causing its subsidiary bank to offer NOW accounts in place of conventional checking accounts, while continuing to make commercial loans and to provide virtually all of the other services of a commercial bank. The potential for a substantial and widespread evasion of the fundamental policies of the Act through such arrangements is evident. Indeed, Congress itself has recognized that NOW accounts, although only available to individuals, are functionally equivalent to demand deposits and must be treated as such in order to prevent evasion of statutory provisions governing demand deposits (Pet. App. 40a-42a). The Third Circuit also correctly recognized that the Board is authorized to penetrate the form of deposit arrangements to reach accounts that in substance function as demand deposits in order to prevent evasion of the Act's bank definition. *Wilshire Oil Co.*, 668 F.2d at 739.

---

[8] The impracticability of invoking the notice requirement on NOW checking accounts is further evidenced by the fact that, under federal law, the notice requirement may not be imposed selectively but must be invoked for all accounts at the particular institution that are subject to the same notice of withdrawal requirements. See, *e.g.*, 12 C.F.R. 217.5(a).

B.

The Board's definition of the commercial loan element of the bank definition also is consistent with the terms and legislative history of the Act and necessary to effectuate the purposes of the Act.

There is no dispute that the transactions included in the Board's definition of commercial loan each establish a debtor-creditor relationship and result in the extension of funds to commercial enterprises to finance inventory or other working capital needs—the traditional hallmarks of a commercial loan. *United States* v. *Connecticut National Bank*, 418 U.S. 656, 665 (1974). Thus, the commercial loan definition adopted by the Board is consistent with the terms of the Act.

Moreover, the treatment of these types of transactions as commercial loans is warranted to prevent evasion of the Act that would otherwise result by allowing the ownership by a nonbanking company of a bank that accepts demand deposits and engages in the equivalent of commercial lending through these types of transactions. The legislative history demonstrates that the exemption from the Act for institutions that do not make commercial loans was intended to be interpreted "as narrowly as possible." H.R. Rep. 1747, *supra*, at 23 (1970). That the exemption for noncommercial lending institutions was not meant to exclude a large number of institutions is evidenced by the fact that the major thrust of the 1970 Amendments to the Act, which added the commercial loan element, was to broaden comprehensively the Act's coverage to include all companies that control banking organizations to prevent the potential abuses that Congress feared would result through the association in a holding company system of banking and commercial organizations.



The court of appeals erred in invalidating the Board's definition on the grounds that money market instruments are not the result of direct negotiations between borrower and lender. This is not the test of commercial loan—indeed commercial loan participations among banks do not involve direct negotiations (Pet. App. 55a, n.50). Moreover, a substantial portion of the transactions covered by the regulation are purchased through direct negotiations. Nor did the court below even consider the Board's finding that competitive and other pressures would inevitably create the temptation for nonbank banks to extend credit to commercial enterprises by purchasing money market instruments issued by those enterprises.

In addition, even if it is assumed that the Board's regulation represents a "complete change" in its position, the Board in adopting the definition provided the required "reasoned analysis" for rejecting earlier, more restrictive interpretations. The earlier interpretations were made in the context of institutions engaged in very limited functions and the Board had no occasion to consider the potential for evasion that could result from the widespread exploitation of the exemption for noncommercial lending institutions.

C.

In reaching its decision, the court of appeals applied an erroneous standard of review. The court failed to apply the well-established principle that a rule adopted by a federal agency pursuant to an express grant of rulemaking authority to carry out and prevent evasions of the Act must be upheld if reasonably related to the purposes of the legislation. See *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973). The court also failed to give appropriate deference to the Board's expertise in administering the Act. See *Northeast Bancorp*, slip op. 7. Instead, in direct contravention of the decisions of this Court, the court below held

that the Board's authority under the Act is limited basically to anticompetitive considerations and erroneously applied a special standard of review on the ostensible basis that, in the court's view, the Board's action would lead to a change in its own jurisdiction.

In sum, the Board's regulations are a reasonable interpretation of the elements in the bank definition in the Act, are consistent with the legislative history of the Act, and are essential to carrying out the Act's purposes. Accordingly, the Board's broad discretion to adopt these regulations and the regulations themselves should be upheld.

## ARGUMENT

### THE FEDERAL RESERVE BOARD PROPERLY DETERMINED THAT FOR PURPOSES OF THE DEFINITION OF BANK IN THE BANK HOLDING COMPANY ACT "DEMAND DEPOSITS" INCLUDE ALL CHECKING ACCOUNTS AND "COMMERCIAL LOANS" INCLUDE THE PURCHASE OF COMMERCIAL PAPER AND SIMILAR MONEY MARKET INSTRUMENTS.

### INTRODUCTION

This case involves basic statutory policies that Congress has estabiished to govern banking in the United States—the rules embodied in the Bank Holding Company Act aimed at separating banking from commerce and assuring local control over banking.[9] Many of the re-

[9] Over the years the fundamental emphasis in federal banking policy in the United States has been on maintenance of local control over banking, and avoidance of large conglomerates that could result in excessive concentrations of economic and political power. *Northeast Bancorp*, slip op. 16-17; *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. at 38. This policy has had many manifestations: the failure to renew the charter of the Bank of the United States (see H. Hutchinson, *Money, Banking and the United States Economy*, 47-48 (2d ed. 1971)), the exclusive chartering for many years of all banks by the states (*ibid.*), and the tight limitations placed on interstate expansion, first on national banks, which under the original



spondents in this case are companies that wish to engage in "banking" type activities without being subject to the Act. Whether they may do so turns on a narrow, but crucial, definitional question—whether the institutions acquired or operated by the respondent companies are "banks" as that term is defined in the Act—any institution that (1) accepts deposits that the depositor has a legal right to withdraw on demand ("demand deposits") and (2) engages in the business of makng commercial loans. 12 U.S.C. 1841(c). These institutions—national and state chartered commercial banks, industrial banks, and certain privately insured savings and loan associations—that seek to avoid treatment as banks under the BHC Act by not offering one of these two services, while continuing to offer functionally equivalent services, have come to be known as "nonbank banks."

Nonbank banks provide a mechanism for industrial and commercial firms to secure the benefits of affiliation with a commercial bank outside of the broad framework and prudential safeguards that Congress has established to regulate the companies that own or control banks and

National Bank Act could not establish branches (*First National Bank in St. Louis* v. *State of Missouri*, 263 U.S. 640 (1924)) and under the McFadden Act of 1927 (12 U.S.C. 36) are limited to branches in a single state, and then on bank holding companies through the Douglas Amendment to the BHC Act. *Northeast Bancorp*, slip op. 7-12. Modern legislation implementing this policy thrust includes the Banking Act of 1933 (the Glass-Steagall Act, ch. 89, 48 Stat. 162 (1933)), which is aimed at separating commercial banking from investment banking after the inroads that banks had made during the early 1900's into this business through securities affiliates and that nonbanks had made into the banking business through trust companies. See *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 629 (1971). This Act was followed by the Bank Holding Company Act of 1956, to prevent the expansion of multibank holding companies across state lines and to limit strictly their acquisitions of nonbanking businesses. Ch. 240, 70 Stat. 133. The 1970 Amendments to the 1956 Act strengthened this legislation by applying these same rules to one-bank holding companies. Pub. L. No. 91-607, 84 Stat. 1760 (1970).

thus raise the potential for significant frustration of the Act's purposes. In particular, section 4 of the Act (12 U.S.C. 1843) forbids a company from conducting both a banking business and activities unrelated to banking, in order to prevent abusive credit practices involving nonbanking affiliates,[10] to protect subsidiary banks against risky nonbanking activities financed by depositors' money,[11] and to forestall the "cartelizing [of] our economy" by preventing "the country's business firms [from] clustering about banks in holding company systems in the belief that such an affiliation would be advantageous, or perhaps even necessary to their survival." [12] In short, the BHC Act was intended to maintain banks as impartial providers of credit, to avoid conflicts of interest and undue concentration of financial resources, as well as to prevent the transmission of unregulated nonbanking risk to the banking system.

Through use of the nonbank bank device, as of April 1985, numerous industrial, securities, insurance, and retailing companies, such as intervenor Household Finance Corporation, Merrill Lynch & Co., Prudential-Bache Securities, Inc., Gulf & Western Corp., Control Data Corp.,

[10] Congress feared that a company controlling both banking and nonbanking businesses might require the customers of the bank to use services offered by the nonbanking affiliate as a condition of doing business with the bank, or might cause the subsidiary bank to make preferential or unsound loans to an affiliate engaged in an unrelated business or to discriminate in granting credit to competitors of the affiliate. S. Rep. 1095, Pt. 1, 84th Cong., 1st Sess. 5 (1955) (1956 Senate Report). See also S. Rep. 1084, 91st Cong., 2d Sess. 2-4 (1970) (1970 Senate Report); H.R. Rep. 1747, 91st Cong., 2d Sess. 11 (1970) (Statement of the Managers on the Part of the House) (1970 Conf. Report).

[11] H.R. Rep. 609, 84th Cong., 1st Sess. 4-5, 16 (1955) (1956 House Report).

[12] *Bank Holding Company Act Amendments: Hearings on H.R. 6778 Before the House Comm. on Banking and Currency*, 91st Cong., 1st Sess. 197 (1969) (*1970 House Hearings*) (testimony of Board Chairman Martin); 1970 Senate Report, *supra*, at 3.



Sears, Roebuck and Co., J.C. Penney & Co., Inc., and Travelers Corp. already control or have announced plans to acquire over 60 federally or state chartered and federally insured commercial banks. In addition, commercial enterprises such as intervenor Household Finance Corporation, General Electric Company, and Teledyne, Inc. control industrial banking organizations that are FDIC-insured and that are authorized to provide services to commercial customers.[13] Although these banks claim not to be "banks" under the BHC Act definition, their ownership by large-scale commercial, securities, insurance and industrial businesses gives rise to the same potential for preferential treatment of affiliates and their customers and unfavorable treatment of competitors, as well as for risks to the financial soundness of the bank and its depositors that led to the enactment of the BHC Act.

In addition, nonbank banks could substantially undermine the carefully circumscribed arrangements, which this Court has upheld, to carry out the policies of the Act for discount brokerage for bank holding companies (*Securities Industry Association* v. *Board of Governors*, No. 83-614 (June 28, 1984)), and for regional banking arrangements (*Northeast Bancorp* v. *Board of Governors*) as well as the prohibition on banks underwriting securities in the form of commercial paper (*Securities Industry Association* v. *Board of Governors*, No. 82-1766 (June 28, 1984)). These activities could take place freely and without limitations through nonbank banks directly, as in the case of interstate expansion, or through affiliations with parent enterprises engaged fully in investment banking and broker-dealer activities.

This potential for occurrence of the abuses Congress sought to prevent through the regulatory framework of the BHC Act is further heightened by the fact that in many cases these institutions claim to avoid coverage by the Act based on voluntary assurances that the nonbank

[13] See Appendix, *infra*, for a list of nonbank banks.

bank will forego part of the ordinary business of commercial banking. Because nonbank banks compete with institutions that offer the full range of banking services, there is a significant likelihood that in practice such assurances may not be adhered to and a nonbank bank, impelled by market pressures, will be tempted to provide indirectly all of the services of a commercial bank.[14]

In addition, under the BHC Act, bank holding companies are subject to prudential safeguards designed to ensure the financial soundness of these companies to assure that they serve as a source of strength to their subsidiary banks. 12 C.F.R. 225.4(a). These safeguards protect not only the customers and depositors of these banks, but also the resources of the federal safety net provided to the banking system by the Federal Reserve's role as lender of last resort (see, *e.g.*, 12 U.S.C. 347, 347b), and by the FDIC's insurance of deposits. 12 U.S.C. 1811. Thus, bank holding companies are required to maintain adequate capital (12 U.S.C. 3907; 12 C.F.R. Part 225, App. A), are prohibited from engaging in specific unsound corporate practices (12 C.F.R. 225.4), and are subject to examination and inspection by the Board as well as registration and periodic reporting requirements (*id.* at 225.5). In addition, the Board is authorized to undertake a broad range of enforcement actions against bank holding companies to prevent violations of law and unsound practices, to remove from office management personnel for misconduct, and to require termination of any nonbanking activity that poses a serious risk to a subsidiary bank. 12 U.S.C. 1818(b)-(f), 1844(e).

---

[14] Valley National Bank, Salinas, California, a nationally chartered nonbank bank affiliated with intervenor Household Finance Corp., which had claimed nonbank status by agreeing not to make commercial loans, entered into a consent cease and desist order with the Comptroller of the Currency in response to charges that the bank had in fact made commercial loans and thus had become a bank under the BHC Act, subjecting its parent corporation to the provisions of that Act. Am. Banker, May 24, 1985, p. 1, col. 3.



Moreover, banks (as defined in the BHC Act) are expressly prohibited from tying any services offered by the bank with any other services it offers or with services provided by its holding company affiliates (12 U.S.C. 1971-78); and specific regulations prohibit coercive tying by bank holding companies. 12 C.F.R. 225.4. In addition, every bank that is a holding company subsidiary must become and remain federally insured.[15] 12 U.S.C. 1842(e). Finally, insured bank subsidiaries of bank holding companies are prohibited from preferential and excessive lending to officers, directors and principal shareholders of both the holding company and its other subsidiaries. 12 U.S.C. 375b(6)(C) and (D).

The commercial and industrial firms that own nonbank banks would be subject to none of these safeguards.[16] Thus, as the Board found, nonbank banks

---

[15] Thrift institutions whose powers have recently been expanded so that these institutions now engage in activities that make them banks for purposes of the Act, but that are not eligible to be insured by the Federal Deposit Insurance Corporation, can meet this requirement by becoming insured by the Federal Savings and Loan Insurance Corporation, since FSLIC-insured institutions are expressly excluded from the BHC Act. 12 U.S.C. 1841(c).

[16] Indeed, the institutions insured by the Ohio Deposit Guaranty Fund, a private deposit insurer and a petitioner below, offered checking accounts and other commercial banking services without federal deposit insurance, but were recently closed by state authorities after experiencing multimillion dollar withdrawals prompted by the perceived inadequacy of the private insurance fund after one insured institution became insolvent. See, *e.g.*, N.Y. Times, Mar. 16, 1985, at 1, col. 1; Wall St. J., Mar. 14, 1985, at 8, col. 1; *id.* Mar. 12, 1985, at 3, col. 2. The closing of the ODGF-insured institutions immobilized the funds of over 500,000 depositors in institutions with assets in excess of $5.4 billion. See *Chase Manhattan Corp.*, 71 Fed. Res. Bull. 462 (1985). Some of the ODGF-insured institutions were owned by companies and thus would have been subject to the BHC Act's federal deposit insurance requirement under the Board's definitions. See C.A. Res. Opp. to Pet. Motions for Stay, 11-12.

Privately insured depository institutions in Maryland, engaged in the same activities, suffered a similar collapse shortly thereafter. N.Y. Times, May 15, 1985, at 1, col. 1; Wall St. J., May 15, 1985, at

"present the potential for a significant, haphazard, and possibly dangerous alteration of the banking structure without Congressional action on the underlying policy issues." See *U.S. Trust Corporation*, 70 Fed. Res. Bull. 371, 373 (1984).

The nonbank bank device also is at odds with another major objective of the BHC Act (embodied in the Douglas Amendment to the Act, 12 U.S.C. 1842(d)) "to retain local, community-based control over banking" by prohibiting the expansion of bank holding companies through acquisition of additional banks in other states without state consent. See *Northeast Bancorp*, slip op. 8-12; *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. at 47. Because the Act's interstate prohibitions apply only to institutions that come within the Act's bank definition, nonbank banks can be acquired in any state without regard to this policy. The serious potential for nonbank banks to undermine the Act's policy on interstate banking is evident in the fact that over 350 applications by bank holding companies to establish nationally chartered nonbank banks on an interstate basis without the approval of the host states have been approved or are pending before the Comptroller of the Currency.[17] Indeed, petitioner Dimension Financial Corporation plans to establish a network of 31 national nonbank banks, each of which would solicit the full range of deposits, in 25 different states, many of which affirmatively oppose the entry of out-of-state banking organizations (J.A. 39A).[18]

---

3, col. 1. In the wake of these developments, respondent Financial Institutions Assurance Corp., a private deposit insurer located in North Carolina, announced that all institutions insured by that fund would apply for federal deposit insurance. Am. Banker, May 15, 1985, at 6, col. 1. FIAC and ODGF have withdrawn as parties before this Court.

[17] Office of the Comptroller of the Currency, Summary of Nonbank Bank Applications Filed with OCC (June 21, 1985).

[18] That the proliferation of nonbank banks will deprive the states of the power to control the structure of banking within their borders is demonstrated by the fact that a number of states have



The potential for unrestrained use of the nonbank bank device to defeat the fundamental purposes of the Act has been recognized by courts that, unlike the court below, have examined the Act's definition of bank in light of the goals Congress sought to accomplish.[19]

In light of the potential for undermining the basic objectives of the Act presented by these developments, the Board acted within its express rulemaking authority to "carry out the purposes of [the BHC Act] and prevent evasions thereof" (12 U.S.C. 1844(b)),[20] in promulgating

---

enacted legislation prohibiting or limiting the acquisition of nonbank banks within their borders. Colo. Senate Bill 47 (Jan. 30, 1985); Conn. Gen. Stat. § 36-563 (West Supp. 1985); Fla. Stat. Ann. § 658.29(1) (West 1984); N.C. Gen. Stat. § 53-229 (Michie Supp. 1984); 1985 N.J. Sess. Law Serv. 208 (West); 1985 Tex. Sess. Law Serv. Ch. 636. Officials in other states have expressed strong opposition to the establishment of nonbank banks in their states (see Pet. App. 62a-71a).

[19] The Eleventh Circuit has held that, in order to prevent evasions of the Douglas Amendment, the Board is authorized, indeed required, to prohibit an out-of-state bank holding company from acquiring a nationally chartered nonbank bank in a state that has not consented to entry by out-of-state banking organizations, even where the nonbank bank did not engage in making commercial loans within the literal terms of the Act's definition of bank and the Board's regulation. *Florida Department of Banking and Finance* v. *Board of Governors*, 760 F.2d 1135, 1138-44 (1985).

Similarly, recognizing that the "only conceivable purpose [of nonbank banks] is to enable their parent companies to escape regulation under the BHC [Act]," a federal district court has preliminarily enjoined the Comptroller of the Currency from issuing final charters for nonbank banks, expressing serious doubts that the National Bank Act authorizes the chartering of such institutions. *Independent Bankers Ass'n of America* v. *Conover*, No. 84-1403-CIV-J-12 (M.D. Fla. Feb. 15, 1985), slip op. 39 (order granting preliminary injunction). As a result of this injunction, the Board returned to applicant bank holding companies all applications to acquire national nonbank banks across state lines.

[20] This authority enables the Board, in construing the Act's definition of bank, to disregard the form of transactions and look to their substance in order to prevent a clear evasion of the purposes of the Act (*Wilshire Oil Co.* v. *Board of Governors*, 668 F.2d

regulations clarifying the two elements of the definition of the term "bank" in order to identify situations where nonbank banks are evading the purposes of the legislation. As we demonstrate below, the Board properly defined "deposits that the depositor has a legal right to withdraw on demand" for purposes of the definition of bank to include NOW accounts. 12 C.F.R. 225.2(a)(1)(A). The Board also properly defined "commercial loans" for purposes of the bank definition to include the purchase of money market instruments, such as commercial paper, which constitute the indirect provision of credit to commercial and industrial enterprises. 12 C.F.R. 225.2(a)(1)(B).

**A. Consistent With the Terms and Legislative Intent of the BHC Act and in Order to Prevent Evasions of the Purposes of That Act, the Board Acted Within Its Discretion Under the Statute in Determining That NOW Accounts Are Demand Deposits for Purposes of the Definition of Bank.**

The Board acted in accordance with the terms and legislative intent of the Act and within the Board's express authority to carry out the purposes and prevent evasions of the BHC Act in defining "deposits that the depositor has a legal right to withdraw on demand" as used in the Act's definition of bank to include NOW accounts.

1. NOW accounts operationally are indistinguishable from conventional demand deposit checking accounts because they are freely withdrawable by check on demand and because the notice of withdrawal requirement is not, and cannot practicably be, exercised (Pet. App. 38a-40a).[21] Drafts drawn on NOW accounts are cleared and

at 739) and in order to "insur[e] compliance with Congress' goals." *Florida Department of Banking and Finance*, 760 F.2d at 1144.

[21] Like a conventional checking account, the NOW account depositor makes withdrawals by means of a negotiable draft given to a third party payee to effect a transfer of funds to the third party from the depositor. The payee of the NOW draft typically deposits



collected through the Federal Reserve's check collection facilities as demand items, exactly like conventional checks, and are accepted by merchants and others on the basis that they are demand items (Pet. App. 38a). NOW accounts, moreover, are uniformly advertised by depository institutions as "checking accounts," with little if any reference to the theoretical notice of withdrawal requirement (*Id.* at 39a). Empirical evidence shows that, because of the operational similarity of NOW accounts to conventional demand deposits, both types of accounts are used by depositors for precisely the same purposes—to pay bills and perform other financial transactions.[22]

The legislative history of the BHC Act provides compelling support for the Board's reading of the statutory "legal right to withdraw on demand" language in the bank definition as covering NOW accounts. The history shows that this language was intended to create a functional test for delineating the kind of deposits

it in the payee's bank for collection from the drawee institution. The drawee institution then charges the depositor's NOW account to pay the draft. See, *e.g.*, *New York State Bankers Ass'n* v. *Albright*, 38 N.Y. 2d 430, 381 N.Y.S. 2d 18, 343 N.E. 2d 735 (1975); Kaplan, *Federal Legislative and Regulatory Treatment of NOW Accounts*, 91 Banking L.J. 439, 440 (1974) ("NOW accounts permit money transfers to third parties in much the same manner as conventional checking accounts").

The United States Court of Appeals for the District of Columbia has recognized the functional equivalence of demand deposits and a NOW account-like arrangement (an automatic transfer arrangement between a notice of withdrawal account and a zero-balance checking account). *American Bankers Ass'n* v. *Connell*, 686 F.2d 953, 954 (D.C. Cir.), cert. denied, 444 U.S. 920 (1979). See *Otero Savings & Loan Ass'n* v. *Federal Home Loan Bank Board*, 665 F.2d 279 (10th Cir. 1981) (similar treatment accorded identical type arrangement).

[22] *E.g.*, Hoffman and Herman, *NOW Accounts in New England*, in American Bankers Association, Studies on the Payment of Interest on Checking Accounts 31 (1976) ("[A] large number of depositors are using their NOW account as their main transaction account"); Simpson and Williams, *Recent Revisions in the Money Stock*, 67 Fed. Res. Bull. 539, 542 (1981) (70 to 80 percent of funds deposited in new-type checking accounts, *e.g.*, NOW accounts, opened in early 1981 were shifted from conventional demand deposits).

covered by the Act and that the determinative function is the ability routinely to make withdrawals by check. Thus, Congress selected the "legal right to withdraw" terminology not because Congress believed the legal rights of depositors to be crucial, but because Congress wished to cover "checking accounts" and used the terminology that then designated the only kind of checking account in existence.[23] See *Wilshire Oil Co.* v. *Board of Governors*, 668 F.2d at 737.

As originally enacted, the BHC Act defined a bank broadly to include "any national banking association or any State bank, or savings bank, or trust company." Bank Holding Company Act of 1956, ch. 240, § 2, 70 Stat. 133, 12 U.S.C. 1841. In response to inquiries as to whether state chartered industrial banks were "State banks" for purposes of this definition, the Board ruled that such an institution would be covered if it either "[1] accept[ed] deposits subject to check or [2] otherwise accept[ed] funds from the public that [were], in actual practice, repaid on demand." 49 Fed. Res. Bull. 166 (1963).[24] This interpretation covered as banks institutions that received two separate classes of deposits distinguished, not by the existence of a notice of withdrawal requirement, but functionally by the method by which withdrawals could be made.

In 1966, representatives of the industrial banking industry subsequently requested Congress to exclude these institutions from coverage under the definition of bank.[25]

---

[23] NOW accounts did not exist until the early 1970's when they were offered by nonfederally insured thrift institutions in New England. Congress first authorized federally insured banks to offer NOW accounts in New England in 1973 and nationwide in 1980. See p. 36, *infra*. Prior to that time, federally insured banks were prohibited from offering NOW accounts by the federal ban on the payment of interest on demand deposits enacted in 1933. 12 U.S.C. 371a and 1828(g)(1).

[24] See also 51 Fed. Res. Bull. 1539-40 (1965).

[25] Historically, industrial banks (also referred to as Morris Plan banks or industrial loan companies) were consumer-oriented institutions that provided installment credit to consumers and accepted passbook savings deposits and sold investment certificates (similar to bank certificates of deposit). These institutions were called "industrial" banks because they served industrial workers and other similar customers who at the time often could not obtain credit from commercial banks. See, *e.g.*, H. Jennings, *The Consumer in Commercial Banking* 13 (1939); R. Saulnier, *Industrial Banking Companies and Their Credit Practices* 12 (1940).



As a basis for exemption, they expressly advised Congress that industrial banking companies "[did] not accept checking accounts," although they did accept deposits "in passbook or certificate form." *Amend the Bank Holding Company Act of 1956: Hearings on S. 2353, S. 2418 and H.R. 7371 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 89th Cong., 2d Sess. 157-158 (1966) (*1966 Senate Hearings*).[26] The Board endorsed the trade association's request, proposing that the definition of bank be amended to cover only "an institution that receives deposits payable on demand * * * (*i.e.*, banks that offer checking accounts)" (*Id.* at 447). The Board stated that this proposal would exclude industrial banks and other institutions "that accept funds from the public that are paid on demand" (*ibid.*). This proposal was plainly meant to continue coverage of the deposits in the first category described in the Board's 1963 interpretation (deposits subject to check) and to exclude from coverage deposits in the second category (passbook and statement savings accounts which were in practice paid on demand but which were not withdrawable by check).

The Board's proposal was in substance enacted. Pub. L. No. 89-485, § 3, 80 Stat. 236, 12 U.S.C. 1841(c). Although the language in the bill reported by the Senate Banking Committee (and later enacted) referred to de-

---

[26] Although the accounts offered by industrial banking organizations were subject to a prior notice requirement, the institutions permitted withdrawals from these accounts on demand and thus could have fallen within the second prong of the Board's 1963 interpretation of "bank" (*ibid.*).

posits in terms of a legal right to withdraw on demand, the Committee's report explaining this language describes it in functional terms as covering deposits "payable on demand (checking accounts)", precisely the terminology the Board had proposed.[27] S. Rep. 1179, 89th Cong., 2d Sess. 7 (1966). The Report emphasized that receipt of checking accounts was "the commonly accepted test of whether an institution is a commercial bank" and captioned its discussion of the amendment as concerning the "[e]xclusion of institutions that do not accept checking accounts" (*ibid.*) (emphasis omitted). According to the sponsor of the amendment, the new definition of bank would exclude industrial banks and similar institutions that "do not accept demand deposits subject to check," *i.e.*, "deposits in the form ordinarily received by commercial banks." 112 Cong. Rec. 12385-86 (1966) (remarks of Sen. Robertson). Thus, the legislative history is clear that the "legal right to withdraw on demand" language in the bank definition was intended by Congress to cover deposits withdrawable by check and paid on demand—a definition that squarely encompasses NOW accounts.

Moreover, at the time the demand deposit proviso was added to the Act in 1966, notice of withdrawal accounts that could be checked against (identical to what later would be called NOW accounts) had been treated as demand deposits for bank regulatory purposes for over 50 years and on this basis had been prohibited for federally regulated banks since 1933. 21 Fed. Res. Bull. 863 (1935). See 26 Fed. Reg. 12031 (1961). This was done

[27] Respondents have cited no evidence (nor has any been uncovered) even suggesting that the substitution of the "legal right to withdraw" terminology was intended to effect a substantive change in meaning. Indeed, it would make little sense for Congress, with no explanation or discussion, to have abandoned a recognized test for coverage based on function (method of withdrawal) and replace it with a purely technical test that has no functional significance whatsoever.



in recognition of the fact that "the practice * * * of drawing checks on savings deposits" converts such notice of withdrawal accounts into "ordinary checking accounts and evade[s] the statutory prohibition against payment of interest on demand deposits." 21 Fed. Res. Bull. at 792.[28]

The court of appeals' entire analysis of this history is premised on the unsupportable assumption that the addition of the demand deposit test in 1966 completely overturned the Board's 1963 interpretation of the scope of the definition of bank in the original Act. *First Bancorporation*, 728 F.2d at 437. This assumption ignores the fact that the 1963 interpretation covered two distinct classes of deposits: checking accounts and savings deposits in practice repaid on demand. As shown above, the demand deposit amendment clearly meant to continue to cover institutions that offered checking accounts.[29]

2. Apart from the legislative history, a NOW account depositor, as the Board expressly found (*First Bancorporation*, 68 Fed. Res. Bull. at 253), does in fact have a legal right to withdraw funds from the account on demand unless and until the depository institution actu-

[28] Similarly, the Board earlier had recognized that deposits subject to a notice of withdrawal requirement but that "ordinarily may be checked upon" were demand deposits for purposes of the provisions of the Federal Reserve Act of 1913 (38 Stat. 270) requiring member banks of the Federal Reserve System to maintain reserves against various kinds of deposits. 1 Fed. Res. Bull. 38-39 (1915). Accord, *id.* at 73; 9 Fed. Res. Bull. 677 (1923); 13 Fed. Res. Bull. 609 (1927).

[29] The court of appeals' reliance on legislative understanding that the "demand deposit" test would exclude industrial banks (*First Bancorporation*, 728 F.2d at 437) is misplaced. As Congress clearly was aware, at the time of the demand deposit amendment, industrial banks did not accept deposits subject to check. 112 Cong. Rec. 12385 (1966) (remarks of Sen. Robertson); *1966 Senate Hearings*, *supra*, at 157. Today, however, as the respondent industrial banking organizations admit, such institutions are authorized to, and do, accept checking accounts in the form of NOW accounts.

ally requires prior notice of withdrawal.[30] Prior notice of withdrawal can never be practicably invoked with regard to NOW accounts, because withdrawals are made from such accounts by checks given directly to third party payees and invoking the prior notice requirement would cause serious damage to the reputation of the institution and loss of customer good will.[31] Indeed, requiring prior notice of withdrawal would defeat the very purpose of NOW accounts as a substitute for demand checking accounts.[32]

The Board is not aware of a single instance, and respondents have cited none, in which the notice of withdrawal requirement has been invoked on NOW accounts (see Pet. App. 40a). Indeed, during the recent crises in Ohio and Maryland involving privately insured depository institutions offering NOW accounts, there is no evidence that any such institution invoked the prior notice of withdrawal requirement, even though many

---

[30] Under federal law, the notice requirement, if invoked, must be required for all similar accounts at the institution, thereby eliminating the ability to selectively require notice on NOW accounts. See 12 C.F.R. 217.5(a) and 329.5(a).

[31] By requiring prior notice of withdrawal with respect to a NOW account, the depository institution would necessarily be required to refuse or delay payment to the payee of the NOW draft, undoubtedly a bona fide holder of a negotiable instrument, such as a merchant who typically has given value for the draft and who is not necessarily a customer of the depository institution. Payees would no longer accept drafts drawn on that institution and depositors, needing a more reliable method of effecting payments, would ultimately withdraw their NOW account funds.

[32] Under the Board's regulation, holders of traditional passbook or statement savings accounts or of similar types of deposits, which usually also are repaid in practice on demand, do not have a legal right to withdraw on demand for purposes of the definition of bank. Withdrawals from these types of deposits cannot be made by checks given directly to third parties, and thus the prior notice of withdrawal can practicably be required with respect to such accounts and in fact on occasion has actually been required. See Am. Banker, June 22, 1976, p. 1, col. 2.



institutions were threatened by massive withdrawals from such accounts that eventually required the closing of the institutions by state authorities. In recognition that notice is unlikely ever to be required on NOW accounts, the Federal Reserve treats NOW accounts as components of the M1 money stock measure, the same treatment given to currency and demand deposits.[33]

Thus, the very nature and purpose of NOW accounts underscores the fact that the depositor has a legal right to withdraw on demand from such accounts, until prior notice of withdrawal is actually required. Accordingly, NOW accounts fall within the terms of the "legal right to withdraw" language in the bank definition.

3. This Court has repeatedly stated that the language of a statute must be read with a view to the "policy of the legislation as a whole" and cannot be read to negate the plain purpose of the legislation.[34] This principle is particularly applicable in this case in view of the express congressional mandate to the Board to take necessary action to carry out the purposes and prevent evasions of the Act.[35] As the Board found, and the record in this case demonstrates, NOW accounts are the functional equivalent of demand deposits and the failure to recognize this equivalency would open an avenue for evasion of the BHC Act that would negate to a substantial extent the Act's plain purposes.

---

[33] See, *e.g.*, 71 Fed. Res. Bull. A3 (July 1985); H.R. Rep. 263, 96th Cong., 1st Sess. 4 (1979) (NOW accounts "form the basis, along with Federal Reserve currency, of our country's medium of exchange.").

[34] *United States* v. *American Trucking Ass'ns, Inc.*, 310 U.S. 534, 542-43 (1940). See *Bob Jones University* v. *United States*, 461 U.S. 574, 586 (1983); *United Steelworkers of America* v. *Weber*, 443 U.S. 193, 201-02 (1979); *Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979).

[35] See *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. at 371; *Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 255 (1945); *Wilshire Oil Co.* v. *Board of Governors*, 668 F.2d at 738-39.

If NOW accounts are not treated as demand deposits, a nonbanking company could become affiliated with a federally or state chartered bank that engages in activities functionally identical to those of institutions the Act otherwise covers without being subject to the regulatory framework Congress established for such affiliations. As a result, nonbanking companies would escape the prudential and other provisions of the Act designed to prevent the abuses that Congress determined were likely to arise from the commingling of banking and commerce.

In addition, the ability of bank holding companies, as well as nonbanking commercial enterprises, to own nonbank banks with NOW account and commercial lending powers would result in multi-state, indeed nationwide, networks of nonbank banks and *de facto* interstate banking without the consent of any state, as required by the interstate provisions of the Act, or the Congress. Such a result is in direct conflict with the provisions of the Act and would nullify the Act's purpose to maintain local control of banking expansion across state lines. See *Northeast Bancorp*, slip op. 12.

In view of the functional equivalency of NOW accounts and demand deposits and the potential for nonbank banks to undermine the purposes of the BHC Act, the Board properly exercised its authority to prevent evasions of the Act by adopting a reading of the bank definition that would include NOW accounts.

Contrary to the opinion below (*First Bancorporation*, 728 F.2d at 436), there are no differences in substance between NOW accounts and conventional demand deposits that are material to the purposes of the BHC Act. Although, unlike conventional demand deposits, NOW accounts are not generally available to corporate depositors,[36] this factor at best serves merely to limit, but not prevent completely, the evasion of the Act that results

[36] 12 U.S.C. 1832(a)(2). Some businesses, *i.e.*, sole proprietorships, may have NOW accounts. 12 C.F.R. 217.157(b).



from the operational identity between the two types of accounts. The fact that NOW accounts pay interest enhances their ability to be used as a substitute for conventional demand deposits. In any event, the differences between NOW and conventional demand accounts regarding availability and interest do not distinguish the actual functions of nonbank banks that accept NOW accounts from those of the many banks that undisputedly are covered by the Act, and which do not conduct a significant amount of corporate business.[37]

Congress itself has recognized that NOW accounts are the functional equivalent of conventional demand deposits (notwithstanding the prior notice requirement) and must be treated as such in order to forestall evasion of legal requirements relating to demand deposits.

4. In the early 1970's, state chartered thrift institutions located in Massachusetts and New Hampshire, which were not federally insured and hence not subject to the federal ban on paying interest on demand deposits, began permitting withdrawals from savings accounts to be made by check, referring to this arrangement as a "NOW account." [38] Congress responded by enacting legislation that effectively banned the offering of NOW accounts by all depository institutions by prohibiting withdrawals from interest-bearing accounts by check or other negotiable instrument, except in Massachusetts and New Hampshire, where NOW accounts were authorized on an experimental basis. Pub. L. No. 93-100, § 2, 87 Stat. 342,

[37] Based on data compiled by the Board in 1984, at about 1,900 commercial banks (more than 10 percent of the total number of banks nationwide), the total amount of conventional demand deposits held by the bank was less than 10 percent of the bank's assets. According to statistics maintained by the Board, corporate checking accounts typically constitute about fifty percent of total demand deposits.

[38] See Kaplan, *Federal Legislative and Regulatory Treatment of NOW Accounts*, *supra*.

12 U.S.C. 1832. The legislation was motivated by congressional awareness that:

> Failure to ban "NOW" accounts infringes on a 40-year old statutory prohibition on the payment of interest on checking accounts.

119 Cong. Rec. 16071 (1973) (remarks of Sen. Brock).[39]

In 1980, Congress authorized NOW accounts on a nationwide basis.[40] Pub. L. No. 96-221, § 303, 94 Stat. 146, 12 U.S.C. 1832(a). In enacting this authorization, Congress was clearly aware that permitting NOW accounts in reality sanctioned the payment of interest on demand deposits, because NOW accounts "are the functional equivalent of interest bearing checking accounts." S. Rep. 368, 96th Cong., 1st Sess. 5 (1979). Indeed, the sponsor of the NOW account legislation expressly recognized that the authorization of NOW accounts, which he characterized as interest-bearing accounts "subject to withdrawal on demand," overrides the historic prohibition against the payment of interest on demand deposits. 125 Cong. Rec. 23793 (1980) (remarks of Rep. St Germain).

The 1980 legislation authorizing NOW accounts nationwide also required that depository institutions must maintain the same level of reserves with respect to all transaction accounts, which are defined by statute to include both NOW accounts and conventional demand deposits.[41] 12 U.S.C. 461(b)(1)(C) and (2)(A). Thus,

---

[39] See also *id.* at 15002 (remarks of Rep. Patman) (characterizing NOW accounts as "demand deposits"); *id.* at 15005 (remarks of Rep. Johnson) (characterizing NOW accounts as "checking accounts"); *id.* at 16486 (remarks of Sen. Proxmire) (characterizing NOW accounts as "demand deposits").

[40] Between 1973 and 1980, Congress also permitted NOW accounts on a statewide basis in Connecticut, Maine, Rhode Island, and Vermont (Pub. L. No. 94-222, 90 Stat. 197), New York (Pub. L. No. 95-630, 92 Stat. 3712), and New Jersey (Pub. L. No. 96-161, 93 Stat. 1235).

[41] Because Congress by statutory directive has sanctioned the payment of interest on NOW accounts and required maintenance of the same level of reserves with respect to NOW accounts as are maintained on conventional demand deposits, the manner in which such accounts are currently classified for purposes of the Board's regulations governing reserve requirements and the payment of interest on demand deposits is no longer significant. Such classifications are clearly overshadowed by Congress' statutory determination that NOW accounts and conventional demand deposits must be treated interchangeably.



Congress again affirmed the necessity of treating NOW accounts as demand deposits in order to prevent evasion of legal requirements applicable to demand deposits.

5. The only other court of appeals to interpret the demand deposit test of bank in section 2(c) of the Act completely rejected the formalistic approach adopted by the court below and approved the functional analysis followed by the Board in this case as necessary and appropriate to carry out the intent of the Act and prevent evasions thereof. In *Wilshire Oil Co.* v. *Board of Governors*, a commercial bank attempted to escape coverage as a bank for purposes of the Act by imposing a prior notice of withdrawal requirement on its conventional demand deposits, and advised its customers that it had no intention of exercising that right. 668 F.2d at 733-34. The Third Circuit upheld the Board's determination that, notwithstanding the retention of a notice of withdrawal requirement on its deposits, the institution remained a bank for purposes of the Act (*id.* at 736-40). The *Wilshire* court concluded (as the Board has here) that in enacting the "legal right to withdraw on demand" terminology Congress intended the functional nature of deposits to be the decisive factor because "Congress was not as concerned with the precise legal right of a bank's depositors as it was with the practical effect of the Act on commercial lending practices" (*id.* at 737). The court held that the Board was authorized under the Act to penetrate the form and look to the substance of the transaction and to conclude that the reservation of a prior notice of withdrawal requirement had no practical effect on the operations of the bank involved and did not

remove the institution from coverage under the definition of bank in the Act.[42] 668 F.2d at 740.

Given that NOW accounts are checking accounts operationally indistinguishable from conventional demand checking accounts, that Congress intended the Act to cover institutions that offer checking accounts, and that substantial evasion of the Act would otherwise result, the Board clearly acted properly and in accord with the terms and purposes of the Act in including NOW accounts as demand deposits for purposes of the Act's definition of bank.

**B. Consistent With the Statutory Language and Its Legislative History and in Order to Prevent Evasions of the Act the Board Acted Within Its Discretion Under the Act in Defining Commercial Loans for Purposes of the Definition of Bank to Include the Purchase of Commercial Paper and Other Money Market Transactions.**

The Board defined the term "commercial loans" for purposes of the BHC Act's definition of bank in accordance with its longstanding interpretation of the term as "any loan other than a loan to an individual for personal, family, household, or charitable purposes." 12 C.F.R. 225.2(a)(1)(B). The Board's regulation includes within the scope of this definition the purchase of money market instruments, such as commercial paper, bankers' acceptances, and certificates of deposit, the purchase of retail installment loans, the sale of federal funds, and the making of broker call loans because, as the Board found, these transactions constitute the direct or indirect extension of credit to a business organization (*ibid.*). This definition is consistent with the terms and legislative intent of the Act and clearly constitutes a reasonable

[42] As explained above, pp. 34-35, *supra*, the differences in substance between the type of transaction account at issue in *Wilshire* and the NOW accounts covered by the Board's regulation are not significant, viewed in terms of the broad purposes of the Act.



exercise of the Board's authority under the Act to adopt rules to carry out the purposes of the Act.

1. The BHC Act does not define the term "commercial loans" for purposes of the statutory definition of bank. The purchase of money market instruments and other transactions defined by the Board as commercial loans for purposes of the definition of bank clearly fall within a permissible construction of that term. Indeed, neither the court of appeals nor respondents have challenged the Board's findings as to the economic nature of the relevant money market instruments.

It is uncontested that each of the transactions covered by the Board's definition establishes a debtor-creditor relationship and results in the extension of credit and that the beneficiaries of these transactions are not individuals, but rather corporations that utilize the funds for business purposes. Moreover, as the Board found (Pet. App. 48a-55a), these transactions also fall within this Court's definition of the term "commercial loan" as short-term transactions in which funds are provided to businesses, typically for inventory or working capital needs. See *United States* v. *Connecticut National Bank*, 418 U.S. 656, 665 (1974).

For example, as the Board stated (Pet. App. 49a), commercial paper refers to "a prime quality, short-term promissory note establishing a debtor-creditor relationship between a lender and * * * large, financially strong corporate borrowers [needing] funds for seasonal or working capital purposes."[43] This finding accords fully with this Court's recent observation that "the authority to discount commercial paper" places "banks in their traditional role as a prudent lender," and that banks purchase commercial paper for their own account as part

[43] See generally Hurley, *The Commercial Paper Market*, 63 Fed. Res. Bull. 525, 527-28 (1977); M. Stigum, *The Money Market* 625-48 (rev. ed. 1983) (Stigum).

of "the process of extending credit." *Securities Industry Association* v. *Board of Governors*, No. 82-1766, slip op. 20, 21 n.11. Indeed, when the commercial lending test was added, commercial paper purchased by a bank in the open market was reported for regulatory purposes in the bank's published balance sheet in the category of "commercial and industrial loans." [44]

Based on the undisputed economic characteristics of the instruments, the Board also reasonably found that a bank's purchase of certificates of deposit [45] and bankers' acceptances [46] and sale of federal funds [47] each represents a short-term extension of credit to a business enterprise in order to finance inventory or for other working capi-

[44] See C. A. Pet. Joint Reply Br. App. 1793. See also Pet. App. 50a (opinion letters of the Comptroller of the Currency that commercial paper is nothing but a "loan to industrial corporations"). Thus, the court below was clearly in error in asserting that the term commercial loans "as used in the banking business when the Act was adopted did not include the purchase of money market [instruments]" (*id.* at 11a-12a).

[45] A certificate of deposit (CD) is an instrument evidencing the obligation of a bank to repay a sum of money at a specified time and, generally, at a fixed rate of interest. Banks issue large denomination CDs ($1 million or more) in the money market to finance working capital needs—to fund short-term loans by the bank (Pet. App. 50a-52a). Stigum, *supra*, at 35-36, 525-38; C. Henning, W. Pigott, and R. Scott, *Financial Markets and the Economy*, 293-95 (3d ed. 1981) (*Financial Markets and the Economy*).

[46] A bankers' acceptance is an order drawn on a bank to pay a specified sum on a specified date (usually several months in the future) that the drawee bank has accepted, *i.e.*, agreed to pay at maturity. Bankers' acceptances are used to finance specific, identifiable commercial transactions by the account party (the business on whose behalf the draft is accepted), usually the import or export of goods (Pet. App. 53a-55a). *See* Stigum, *supra*, at 39-40, 602-11; H. Harfield, *Bank Credits and Acceptances*, 116-53 (5th ed. 1974).

[47] The "sale" of federal funds is the loan (usually overnight) of excess funds on deposit in a depository institution's reserve account with the Federal Reserve to another depository institution (Pet. App. 53a). See Stigum, *supra*, at 33-34; *Financial Markets and the Economy*, *supra*, at 287-90.



tal purposes. There is no reasonable dispute that, in the case of interbank money market transactions, funds are clearly being extended to a commercial enterprise, which uses the proceeds to make loans—the inventory of a bank.[48]

Similarly, it cannot be reasonably disputed that a bank's purchase of retail installment paper from a merchant involves a clear extension of credit to finance the day-to-day commercial operations of the merchant and that broker call loans are demand loans to finance operations of securities brokers (Pet. App. 59a).

2.a. The relevant legislative history demonstrates clearly that the exemption from the Act's coverage for institutions that do not engage "in the business of making commercial loans" was a technical amendment to the Act designed to create a narrowly circumscribed exclusion from the Act's coverage. The provision was introduced by Senator Brooke without any discussion or comment (116 Cong. Rec. 14818-22 (1970)) and was added in committee to the bill eventually enacted. See 116 Cong. Rec. 42426 (1970) (remarks of Sen. Sparkman); 1970 Senate Report, *supra*, at 24. The Board did not object to the amendment, explicitly recognizing "the very limited application of this amendment, * * * possibly affecting only one institution." *One-Bank Holding Company Legislation of 1970: Hearings on S. 1052 and Related Bills Before the Senate Comm. on Banking and Currency*, 91st Cong., 2d Sess. 137 (1970). Congress subsequently was advised that "virtually the only bank which does no commercial lending * * * is the Boston Safe Deposit & Trust Co., a subsidiary of the Boston Co." 116 Cong. Rec. 25848 (1970) (remarks of Rep. Gonzalez). The statement of the majority of the House

[48] A bank is clearly a "commercial" enterprise. See *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 355-57 (1963) (commercial banking is a "line of commerce" for purposes of the Clayton Act).

conferees on the legislation directed that "[t]he Board should interpret th[is] exemption[] as narrowly as possible in order that all bank holding companies which should be covered under the Act in order to protect the public interest will, in fact, be covered." 1970 Conf. Report, *supra*, at 23.

b. That Congress meant the commercial loan exception to be narrowly construed is also graphically shown by the other amendments to the Act adopted in 1970, which substantially reaffirmed and strengthened the regulatory framework of the Act. The 1970 Amendments extended the coverage of the Act to previously exempt companies, in particular to those companies controlling only a single bank.[49] Pub. L. No. 91-607, § 101(a), 84 Stat. 1760, 12 U.S.C. 1841(a)(1).[50] The 1970 Amendments also sought to protect the customers of banking institutions by enacting a broad regulatory framework designed to prevent the anticompetitive and unfair tying of bank services. Pub. L. No. 91-607, § 106, 84 Stat. 1766, 12 U.S.C. 1971-78. Since these anti-tying provisions apply only to banks as defined for purposes of the BHC Act (12 U.S.C. 1971), it is highly implausible that the exemption for non-commercial lending institutions was meant to exclude a significant number of banking institutions. Indeed, during consideration of the 1970 Amendments, Congress specifically rejected an exemption for small banks.[51]

---

[49] The 1970 legislation also deleted the exemptions for partnerships that controlled a bank and for bank trust departments holding substantial blocks of stock of a bank with sole power to vote the stock and authorized the Board to find that a company controls a bank (and thus becomes subject to the Act) by exercising a controlling influence over the policies of the bank. 1970 Conf. Report, *supra*, at 12.

[50] Congress's action to cover companies owning a single bank was motivated by the formation during the previous several years of a large number of one-bank holding companies that were free to engage in activities totally unrelated to banking. See 1970 Conf. Report, *supra*, at 11; 1970 Senate Report, *supra*, at 2-4.

[51] 1970 Conf. Report, *supra*, at 23.



In addition, the lack of extensive legislative discussion of the exemption for institutions that do not make commercial loans also shows that the exemption was not intended to sanction any significant departure from the basic objectives of the original Act, which the 1970 Amendments strengthened and reaffirmed. As the Board noted, it is inconsistent with this legislative history to conclude that Congress, almost without debate, intended that the business of making commercial loans, one of the hallmarks of a bank under the Act, be given a narrow reading that would create a new class of depository institution that could be acquired by securities, insurance, retail and other nonbanking companies or on an interstate basis by bank holding companies, without regard for the policies of the states involved (Pet. App. 25a-26a).

c. The court of appeals' analysis of the legislative history is premised on the completely unsupported assumption that both Congress and the Board knew when the 1970 Amendments were being considered that the supposed beneficiary of the exemption, the Boston Safe Deposit & Trust Co., was engaging in purchasing the kinds of money market instruments the Board has now defined as commercial loans (Pet. App. 9a-11a). There is, however, not a scrap of evidence in the legislative history even suggesting that this was the case.[52] If anything, Congress was aware that Boston Safe historically offered primarily trust and investment advisory services.[53]

---

[52] The court of appeals is in error in summarily stating that the Board advised the Senate Committee that purchases of money market instruments by Boston Safe were not considered as commercial loans (Pet. App. 11a). The Board's comments to the committee clearly contained no such statement.

[53] In 1966, the Boston Company, Boston Safe's parent, unsuccessfully requested a separate amendment exempting it from coverage of the Act on the grounds that Boston Safe was "primarily engaged in the fields of investment and property management and in the other fiduciary services usually identified with the personal trust business." *1966 Senate Hearings, supra*, at 732. Nothing in this

Moreover, since, as explained below, a bank's purchase of commercial paper is uniformly understood (in 1970 and today) as the making of a commercial loan by the bank (see *Securities Industry Association*, No. 82-1766, slip op. 20, 21 n.11), it is highly unlikely that Congress actually was aware that (as has subsequently become clear) in 1970 Boston Safe did in fact purchase money market instruments, in particular, commercial paper (J.A. 93A-95A).

3.a. In reaching its decision, the court of appeals also found no evidence of the abuses contemplated by the BHC Act by those purchasing money market instruments, noting that money market transactions take place in the open market (Pet. App. 12a). However, there is no support in the statute or its history for the view that commercial loans must be the result of direct negotiations between borrower and lender.[54] Moreover, the court below flatly ignored the Board's uncontested finding that "a substantial portion of the transactions in all of these instruments occurs through direct negotiations between lenders and borrowers" [55] (*id.* at 55a). Nor did the court even consider the Board's finding that implicit agreements by nonbank banks could result in precisely the type of preferential credit practices the Act was de-

---

request or elsewhere in the legislative history describes or alludes to Boston Safe's money market activities.

[54] For example, participating banks in a loan syndication or participation typically have no direct negotiations with the borrower, which deals only with the lead bank, yet these banks are uniformly understood to be making commercial loans. See, *e.g.*, *Union Planters Nat'l Bank* v. *Commercial Credit Business Loans, Inc.*, 651 F.2d 1174, 1179-85 (6th Cir.), cert. denied, 454 U.S. 1121 (1981).

[55] For example, as of January 1985, almost one-half of the total volume of outstanding commercial paper was directly placed by the borrower. 71 Fed. Res. Bull. A23 (May 1985). Most bank money market CDs are sold directly by banks to lenders. Stigum, *supra*, at 36. Quite clearly, broker call loans and the purchase of retail installment paper involve direct negotiations between lender and borrower.



signed to prevent (*id.* at 28a). For example, a nonbank bank might extend short-term funds to another bank or lending institution by purchasing money market instruments issued by the other institution on the implied understanding that the other institution would look favorably on loan requests by the nonbank bank's commercial or industrial affiliates or by customers of the nonbank bank needing conventional commercial loans. The finding of the court below also ignores the fact that the statute was enacted to foreclose the potential for abusive practices. See 1970 Senate Report, *supra*, at 4 (Act extended to one-bank holding companies "to prevent possible future problems rather than to solve existing ones").

The court of appeals also failed to give heed to the Board's explicit finding on the likelihood of serious enforcement problems posed by the purchase of short-term credit obligations by nonbank banks (Pet. App. 28a). It is evident that an institution that has voluntarily forsaken commercial lending to escape coverage under the Act, but that vigorously markets an otherwise full range of deposit and lending services (including demand deposits to corporate customers) in direct competition with full service banks will be subject to compelling competitive pressure to provide in practice, directly or indirectly, all the services of a commercial bank, regardless of voluntary assurances to the contrary. Thus, a bank that nominally agrees to cease making directly negotiated commercial loans to businesses in order to avoid bank status would be subject to significant competitive and profit-oriented incentives to continue to supply short-term funds to businesses simply by purchasing the business's money market obligations (see pp. 21-22 above).

The fact, cited by the court below, that the commercial loan definition would assertedly cause "extensive changes" by some financial institutions (Pet. App. 5a) affords no grounds for overturning that definition. These institutions (privately-insured savings and loan associations and industrial banks) would be affected by the Board's

definition only if they elect voluntarily to exercise recently conferred, non-traditional powers that make these institutions the functional equivalent of a traditional commercial bank.[56] In tacit recognition that the newly expanded activities of savings and loan associations enable them to act functionally like banks, Congress, in 1982, expressly exempted federally insured savings and loan associations from coverage by the BHC Act. Pub. L. No. 97-320, § 333, 96 Stat. 1504, 12 U.S.C. 1841(c). Pointedly, however, this exemption by its terms did not extend to associations that are privately insured. The inference is plain that Congress intended these institutions to be banks under the BHC Act if they implemented newly authorized, expanded powers.

b. The court of appeals also found error in the Board's regulatory definition of commercial loans largely because the current definition represented what the court perceived as a "complete change" from earlier Board interpretations (Pet. App. 8a). This finding clearly runs afoul of the established teaching of this Court.

It is well established that an agency does not act unlawfully merely because it alters prior views on the meaning of a statute it is charged with administering. This Court repeatedly has "recognize[d] that 'regulatory agencies do not establish rules of conduct to last forever,' *American Trucking Assns., Inc.* v. *Atchison, T. & S.F. R. Co.*, 387 U.S. 397, 416 (1967), and that an agency must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances.' *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968)."

[56] During the 1980's, the powers of savings and loan institutions were significantly expanded by authorizations to provide checking accounts and to make commercial loans. See S. Rep. 536, 97th Cong., 2d Sess. 15-16 (1982). The expansion of powers has contributed significantly to the large numbers of thrift institutions that subsequently became insolvent or are now facing insolvency. See J. Barth, R. Brumbaugh, D. Sauerhaft & G. Wang, *Insolvency and Risk-Taking in the Thrift Industry: Implications for the Future* 4, (June 20, 1985).



*Motor Vehicle Manufacturers Association* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983). "[An agency] faced with new developments, or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice." *American Trucking Associations, Inc.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 387 U.S. 397, 416 (1967).

Even if it is assumed that the Board's current regulation represents a complete change in position,[57] the Board has clearly provided the "reasoned analysis" required by this Court explaining the rationale for altering earlier, narrow views on whether certain kinds of transactions are commercial loans for purposes of the Act. As the Board stated (Pet. App. 60a), the earlier rulings cited in the court of appeals' decision (*id.* at 5a-6a) were made with respect to institutions basically engaged in very limited banking functions, such as trust companies that did not aggressively solicit deposits and loans (J.A. 93A-103A). Because of the limited operations of these institutions, the Board had no occasion in these rulings to examine the potential for evasion of the purposes of the Act that might arise when banks purposefully seek to exploit the exemption by offering as wide a range of lending services as possible yet without becoming banks for purposes of the Act.[58]

As noted above, as nonbank banks began to proliferate in the early 1980's in reliance on the commercial lend-

[57] As noted, the current definition of commercial loan incorporates the basic test of a commercial lending transaction that the Board established in 1971, soon after the commercial lending test of a bank was added to the Act (J.A. 93A, 97A); 12 C.F.R. 225.2(a)(1)(B).

[58] The court of appeals concluded that transactions once viewed as not involving commercial lending may never be regarded as evasions of the Act (Pet. App. 9a, 10a). This finding ignores the fact (as the Board expressly found here) that after an initial legal interpretation has been issued evidence can develop that certain practices in actual operation produce evasions of the Act.

ing test in the Act,[59] the Board was compelled to reexamine the proper scope of the definition and concluded that the purchase of money market instruments must be viewed as the making of a commercial loan in order to prevent evasion of the Act (J.A. 65A-70A).

### C. The Court Below Erred in Failing to Defer to the Board's Expertise in Administering the BHC Act.

The court of appeals failed to give proper weight to the special role Congress has assigned to the Board in administering the BHC Act and adopted an erroneous view of the scope of the express congressional delegation of authority to the Board to issue regulations as may be necessary to carry out and prevent evasions of the Act. 12 U.S.C. 1844(b).

The decision below narrowly construed the Board's statutory authority to prevent evasions, stating that "[t]he authority of the Board under the Act is to be exercised in a restricted area," limited "basically to anticompetitive considerations" (Pet. App. 12a). Such a finding cannot stand, since this Court has expressly rejected assertions that the Act's concern was solely with anticompetitive effects. *Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. 234 (1978); see *Northeast Bancorp*, slip op. 7-12; *Board of Governors* v. *Investment Company Institute*, 450 U.S. 46, 69-71 (1981); *BT Investment Managers, Inc.*, 447 U.S. at 46-49.

---

[59] In a March 1981 letter containing no explanation or supporting reasoning, the Board concluded that a bank subsidiary of the Gulf & Western Corp. would not be engaged in making commercial loans for purposes of the Act if it did not purchase certain money market instruments (J.A. 110A-12A). The Gulf & Western letter triggered a wave of acquisitions and proposed acquisitions of nonbank banks by companies engaged in all types of businesses, threatening to create a new class of nonbank banks that were involved in a far greater range of activities than the institutions involved in the earlier rulings (see Pet. App. 24a-25a).



In addition, the decision created its own unusually strict (but undefined) standard of review, ruling that because the Board's action "is a redefinition and expansion of jurisdiction by an agency * * * different standards [must] be met than are demanded in a typical administrative redefinition not involving such elements" (Pet. App. 9a). Such a standard is flatly at odds with the holding of this Court that "the direction in which an agency chooses to move [in changing past policy] does not alter the standard of judicial review established by law." *Motor Vehicles Manufacturers Association*, 463 U.S. at 42.

To the contrary, this Court has made clear that regulations issued pursuant to an express delegation of authority to promulgate regulations necessary to carry out the purposes of a particular statute should be upheld if the regulations are "reasonably related to the purposes of the enabling legislation," *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973), or if they "achieve with reasonable effectiveness the purposes for which [Congress] has acted." *E.I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112, 132 (1977). Under such a standard, the Board's regulations, which manifestly further the purposes of the Act, should be upheld.

The regulations should also be upheld because the views of the Board, as the expert agency charged with administering the Act, are entitled to substantial weight. This Court has repeatedly recognized that the Board is "an authoritative voice on the meaning of a federal banking statute" (*Northeast Bancorp*, slip op. 7), and that the Board's interpretation of the BHC Act "is entitled to the greatest deference." *Securities Industry Association*, No. 83-614, slip op. 8, quoting *Board of Governors* v. *Investment Company Institute*, 450 U.S. at 56

(1981).[60] See *Board of Governors* v. *Agnew*, 329 U.S. 441, 450 (1947) (Rutledge, J., concurring).

Deference to the Board's expertise is particularly appropriate in the circumstances of this case. Since NOW accounts developed after the demand deposit test of "bank" was added to the Act, Congress did "not directly address the precise question at issue" and, accordingly, the court below should have deferred to the Board's inclusion of such accounts as demand deposits as a "reasonable interpretation made by the administrator" of the statute. *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), slip op. 5-6. Similarly, since the statutory language and legislative history are silent as to the particular types of obligations that are commercial loans for purposes of the Act, "considerable weight should be accorded" to the Board's application of that term to specific transactions.[61] *Id.* at 6. See *Unemployment Compensation Commission* v. *Aragon*, 329 U.S. 143, 153 (1946).

---

[60] Although the court's reasons for lack of deference were stated in its discussion of the commercial loan definition, it is evident that the court's views would apply equally in connection with its review of the demand deposit definition. Indeed, the *First Bancorporation* decision, which deals with the status of demand deposits, fails even to consider the court's duty to accord deference to the Board's expertise in administering the BHC Act.

[61] The court of appeals' obligation to accord deference to the Board's views is not excused by the fact that other regulatory agencies, which are not charged with administering the Act, disagreed with the Board. The Board's jurisdiction under the BHC Act is exclusive and paramount. *Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. at 250. The comments, cited by the court of appeals (Pet. App. 17a), of other regulatory agencies, which have no experience in construing and applying that Act, are not premised on any common industry understanding of what constitutes a commercial loan, but were based on what manifestly is an unduly narrow and incorrect reading of the purposes of the Act and on the faulty supposition that administrators may never alter their views. Similarly, the opinions of Federal Reserve Banks (Pet. App. 17a) are not binding on the Board. Cf. *First Lincolnwood Corp.*, 439 U.S. at 239-41.



## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

MICHAEL BRADFIELD
*General Counsel*

JAMES V. MATTINGLY, JR.
*Deputy General Counsel*

RICHARD M. ASHTON
*Associate General Counsel*

KEVIN J. HANDLY
*Attorney*

*Board of Governors of the Federal Reserve System*

---

I authorize the filing of this brief.

CHARLES FRIED
*Acting Solicitor General*

JULY 1985

# APPENDIX

FDIC INSURED NONBANK BANKS: COMMERCIAL BANKS & TRUST COMPANIES*
As of April 12, 1985

| Bank | Parent Company | Date Acquired or Opened |
|---|---|---|
| 1. Investors Bank & Trust Co., Boston, Massachusetts | Eaton & Howard, Vance Sanders Inc., Boston, Massachusetts | 1969 |
| 2. Bradford Trust Co., New York, New York | Fidata Corp. (formerly Bradford National Corp.), New York, New York | 1972 |
| 3. Bessemer Trust Company, N.A., New York, New York | Bessemer Group, Inc., New York, New York | 12/20/74 |
| 4. Bradford Trust Co. of Boston, Boston, Massachusetts | Fidata Corp., New York, New York | 1975 |
| 5. City Trust Services, N.A., Elizabeth, New Jersey | City Federal Savings & Loan Association, Elizabeth, New Jersey | 1/4/77 |
| 6. Investors Fiduciary Trust Co., Kansas City, Missouri | Kemper Financial, Inc. (subsidiary of Kemper Corp.) (50%); DST, Inc. (subsidiary of Kansas City Southern Ind.) (50%) | 1972 |
| 7. Associates National Bank, Concord, California | Gulf & Western Corp., New York, New York | 8/12/80 |
| 8. Fidelity Management Trust Co., Boston, Massachusetts | Fidelity Management & Research Corp., Boston, Massachusetts | 3/5/81 |
| 9. Valley National Bank, Salinas, California | Household International Corp., Prospect Heights, Illinois | 8/7/81 |
| 10. Bradford Trust Company of California, Los Angeles, California | Fidata Corp., New York, New York | 7/1/81 |
| 11. Boston Safe Deposit & Trust Co., Boston, Massachusetts | Shearson/American Express Inc., New York, New York | 9/25/81 |
| 12. Fidelity National Trust Co., Glendale, California | Fidelity Federal Savings & Loan Association, Glendale, California | 9/23/81 |
| 13. Colonial National Bank, Wilmington, Delaware | Teachers Service Org., Willow Grove, Pennsylvania | 1/21/82 |
| 14. Wellington Trust Co. of Boston, N.A., Boston, Massachusetts | Wellington Management Co., Boston, Massachusetts | 3/1/82 |
| 15. Suburban Bank/Delaware, Dover, Delaware | Suburban Bank, Bethesda, Maryland | 9/15/82 |
| 16. Citizens National Bank, Fairfield, Connecticut | Gateway Bank, Norwalk, Connecticut | 11/7/83 |
| 17. Western Family Bank, N.A., Carlsbad, California | McMahan Valley Stores, Carlsbad, California | 4/14/83 |
| 18. Marsh & McLennan Trust Co., Boston, Massachusetts | Marsh & McLennan Inc., New York, New York | 12/29/82 |

* Data based upon information received from the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation and records of the Board of Governors of the Federal Reserve System. See also *American Banker*, April 16, 1985, at 34-35.

| | Bank | Parent Company | Date Acquired or Opened |
|---|---|---|---|
| 19. | Dreyfus Consumer Bank, East Orange, New Jersey | Dreyfus Corp., New York, New York | 12/27/82 |
| 20. | Citizens Fidelity (Ohio), N.A., Cincinnati, Ohio | Citizens Fidelity Corporation, Louisville, Kentucky | 7/25/83 |
| 21. | Dreyfus National Bank & Trust Co., New York, New York | Dreyfus Corp., New York, New York | not yet consummated |
| 22. | Beneficial National Bank (USA), Wilmington, Delaware | Beneficial Corp., Wilmington, Delaware | 5/11/83 |
| 23. | Fidelity Bank & Trust Co., Salem, New Hampshire | Fidelity Management & Research Corp., Boston, Massachusetts | 6/24/83 |
| 24. | First National Bank of Wilmington, Delaware | Commercial Credit Company (owned by Control Data Corp.), Baltimore, Maryland | 5/20/83 |
| 25. | J.C. Penney National Bank, Harrington, Delaware | J.C. Penney Company, Inc., New York, New York | 6/27/83 |
| 26. | International Central Bank and Trust Corp., Irvine, California | Continental Corp., New York, New York | 6/30/83 |
| 27. | Prudential Bank & Trust Co., Atlanta, Georgia | Prudential Insurance Company of America, Newark, New Jersey | 7/5/83 |
| 28. | Comerica—Midwest, N.A., Toledo, Ohio | Comerica, Inc., Detroit, Michigan | 12/15/83 |
| 29. | U.S. Trust Co., N.A., Palm Beach, Florida | U.S. Trust Corp., New York, New York | 5/21/84 |
| 30. | Trust Management Bank, Boston, Massachusetts | Trust Management Corp. (Rollert & Sullivan Inc.), Boston, Massachusetts | 11/28/83 |
| 31. | Vanguard Fiduciary Trust Co., Valley Forge, Pennsylvania | Vanguard Group of Investment Cos., Valley Forge, Pennsylvania | not yet consummated |
| 32. | E.F. Hutton Bank, Wilmington, Delaware | E.F. Hutton Group Inc., New York, New York | 3/26/84 |
| 33. | American Investment Bank, N.A., Salt Lake City, Utah | Leucadia National Corp., New York, New York | 4/2/84 |
| 34. | The Massachusetts Company, Inc., Boston, Massachusetts | The Travelers Corp., Hartford, Connecticut | 1969 [1] |
| 35. | Templeton Management & Trust Co., N.A., Ft. Lauderdale, Florida | Principals of the Templeton Group of mutual funds, Nassau, Bahamas | not yet consummated |
| 36. | Fidelity National Bank & Trust Co., New York, New York | Fidelity Management & Research Corp., Boston, Massachusetts | not yet consummated |
| 37. | Advest Bank, Hartford, Connecticut | Advest Group, Inc., Hartford, Connecticut | 8/11/83 |
| 38. | NBD Delaware Bank, Wilmington, Delaware | NBD Bancorporation, Detroit, Michigan | 5/8/84 |

[1] Bank originally chartered as a trust company and acquired by Travelers in 1969, but received FDIC insurance on 11/7/83.



| | Bank | Parent Company | Date Acquired or Opened |
|---|---|---|---|
| 39. | Universal Trust Company, San Juan, Puerto Rico | First Boston, Inc., New York, New York | not yet consummated |
| 40. | Depositors First National Bank, New York New York | Individuals associated with the Reserve Fund, Inc. | not yet consummated |
| 41. | Dimension Bank of California, N.A., San Mateo, California | Dimension Financial Corp., Denver, Colorado | not yet consummated |
| 42. | Dimension Bank of Boca Raton, N.A., Boca Raton, Florida | Dimension Financial Corp., Denver, Colorado | not yet consummated |
| 43. | Dimension Bank of Massachusetts, N.A., Newton, Massachusetts | Dimension Financial Corp., Denver, Colorado | not yet consummated |
| 44. | Dimension Bank of Virginia, N.A., McLean, Virginia | Dimension Financial Corp., Denver, Colorado | not yet consummated |
| 45. | Wilmington Trust Company of Florida, N.A., Stuart, Florida | Wilmington Trust Co., Wilmington, Delaware | not yet consummated |
| 46. | Bankers Trust Co. of Florida, N.A., Palm Beach, Florida | Bankers Trust N.Y. Corp., New York, New York | 12/26/84 |
| 47. | Bank of Boston Trust Co. of Southeast Florida, N.A., Deerfield Beach, Fla. | Bank of Boston Corp., Boston, Massachusetts | 6/6/85 |
| 48. | Bank of Boston Trust Co. of Southwest Florida, N.A., Sarasota, Florida | Bank of Boston Corp., Boston, Massachusetts | not yet consummated |
| 49. | Suburban Bank/Washington, N.A., Washington, D.C. | Suburban Bancorporation, Bethesda, Maryland | not yet consummated |
| 50. | First Deposit National Bank, Tilton, New Hampshire (formerly Citizens National Bank) | Capital Holding Corp., Louisville, Kentucky (formerly owned by Parker Pen Co.) | 6/14/84 |
| 51. | Maryland State Bank, Salisbury, Maryland | Wilmington Trust Co., Wilmington, Delaware | 12/28/84 |
| 52. | Southern Bank of Broward County, Pompano Beach, Florida | Continental Telecom Inc., Atlanta, Georgia | not yet consummated |
| 53. | Paine Webber Trust Co., Princeton, New Jersey | Paine Webber Group, Inc., New York, New York | 9/13/84 [2] |
| 54. | Liberty Bank & Trust Co., Gibbsboro, New Jersey | Aetna Life & Casualty Co., Hartford, Connecticut | 12/22/84 |
| 55. | Merrill Lynch Bank & Trust Co., Plainsboro Township, New Jersey | Merrill Lynch & Co., Inc., New York, New York | 12/30/83 [3] |
| 56. | Custodial Trust Co., Trenton, New Jersey | Bear Stearns & Co., New York, New York | 12/21/84 [4] |

[2] State charter granted on 9/13/84; FDIC insurance application pending.

[3] State charter granted and transfer of shares effected on 12/30/83. Opened for business without FDIC insurance 9/84; FDIC insurance application approved 12/17/84.

[4] State charter granted 3/20/84; FDIC insurance granted 12/17/84; opened for business on 12/21/84.

| Bank | Parent Company | Date Acquired or Opened |
|---|---|---|
| 57. FNS Bank of New York, New York, New York | First National State Bancorporation, Newark, New Jersey | not yet consummated |
| 58. Avco National Bank, Anaheim, California | Textron, Inc., Providence, Rhode Island | 3/1/85 [5] |
| 59. Greenwood Trust Co., Greenwood, Delaware | Sears, Roebuck & Co., Chicago, Illinois | 1/14/85 |
| 60. Commercial Trust Company, Inc., San Juan (Hato Rey), Puerto Rico | Drexel Burnham Lambert Group, Inc., New York, New York (sub. of Group Bruxelles Lambert s.a., Brussels, Belgium) | 1/10/85 |
| 61. Lyndon Guaranty Bank of Ohio, Columbus, Ohio | ITT Financial Corporation, Kansas City, Kansas | not yet consummated |
| 62. Centurion Bank, Wilmington, Delaware | American Express Co., New York, New York | 3/85 [6] |

[5] On June 30, 1982, the Comptroller issued a notice of intent not to disapprove the acquisition of Avco National Bank by Avco Corporation under the Change in Bank Control Act. The acquisition was consummated on July 16, 1982. On January 9, 1985, the Comptroller issued a notice of intent not to disapprove the acquisition of Avco Corporation by Textron, Inc. The acquisition was consummated on March 1, 1985.

[6] State charter granted 3/85; FDIC insurance application pending.

NOTE: This table does not include over 200 nonbank banks to be owned by bank holding companies for which the Comptroller has granted preliminary charter approval (beginning on 11/1/84), but which have not yet received Federal Reserve Board approval, and 16 nonbank banks which have received preliminary charter approval from the Comptroller, and Federal Reserve Board approval after January 1, 1985, but which may not open as a result of the preliminary injunction granted by the U.S. District Court for the Middle District of Florida in *Independent Bankers Association of America v. Conover*, No. 84-1403—CIV-J-12.



## FDIC INSURED NONBANK BANKS: INDUSTRIAL LOAN COMPANIES [*]

As of April 12, 1985

| Bank | Parent Company | FDIC Insurance Granted | Date Acquired |
|---|---|---|---|
| 1. Bancorp Finance of Hawaii, Inc., Honolulu, Hawaii | Bancorp Hawaii, Inc., Honolulu, Hawaii [1] | 9/26/83 | 4/7/78 |
| 2. Commerce Savings Lincoln, Inc., Lincoln, Nebraska | Commerce Group, Inc., Lincoln, Nebraska [1] | 11/9/83 | 12/1/72 |
| 3. Commerce Savings Columbus, Inc., Columbus, Nebraska | Commerce Group, Inc., Lincoln, Nebraska [1] | 11/9/83 | 10/30/81 |
| 4. Commerce Savings Scottsbluff, Inc., Scottsbluff, Nebraska | Commerce Group, Inc., Lincoln, Nebraska [1] | 11/9/83 | 6/30/74 |
| 5. GECC Financial Corporation, Honolulu, Hawaii | General Electric Company | 11/21/83 | 8/1/79 |
| 6. Standard Finance Company, Limited, Honolulu, Hawaii | S.F.C. Holdings Corp., Honolulu, Hawaii | 11/21/83 | 1/12/83 |
| 7. First of Omaha Savings Co., Omaha, Nebraska | First National of Nebraska, Inc., Omaha, Nebraska [1] | 11/21/83 | 9/23/77 |
| 8. First Savings Company of Lexington, Inc., Lexington, Nebraska | Dawson Corp., Lexington, Nebraska | 11/28/83 | 9/18/78 |
| 9. Resource Industrial Bank, Denver, Colorado | Integrated Resources, Inc., New York, New York | 12/19/83 | 9/23/83 |
| 10. Citicorp Person-to-Person Financial Center of Utah, Salt Lake City, Utah | Citicorp, New York, New York [1] | 12/23/83 | 1/27/75 |
| 11. Mutual Savings Company of Omaha, Omaha, Nebraska | Mutual Savings Company, Limited, Omaha, Nebraska | 1/30/84 | 8/1/79 |
| 12. Hawaii Thrift & Loan, Honolulu, Hawaii | First Hawaiian, Inc., Honolulu, Hawaii [1] | 2/21/84 | 6/1/75 |
| 13. Southglenn Manufacturers Hanover Industrial Bank, Littleton, Colorado | Manufacturers Hanover Corporation, New York, New York [1] | 2/21/84 | 8/29/80 |
| 14. Manufacturers Hanover Industrial Bank, Denver, Colorado | Manufacturers Hanover Corporation, New York, New York [1] | 2/21/84 | 8/29/80 |
| 15. Denver Manufacturers Hanover Industrial Bank, Denver, Colorado | [illegible]facturers Hanover [illegible]ation, New York, [illegible]York [1] | 2/21/84 | 8/29/80 |
| 16. Broadway Manufacturers Hanover Industrial Bank, Denver, Colorado | Manufacturers Hanover Corporation, New York, New York [1] | 2/21/84 | 8/29/80 |
| 17. Westminster Manufacturers Hanover Industrial Bank, Westminster, Colorado | Manufacturers Hanover Corporation, New York, New York [1] | 2/21/84 | 8/29/80 |
| 18. Intermountain Thrift & Loan Company, Salt Lake City, Utah | Utah Bancorporation, Salt Lake City, Utah | 3/26/84 | 6/30/81 |

[*] Data based upon information received from the Federal Deposit Insurance Corporation and records of the Board of Governors of the Federal Reserve System.

[1] The institution is a registered bank holding company.

| | Bank | Parent Company | FDIC Insurance Granted | Date Acquired |
|---|---|---|---|---|
| 19. | Rainbow Finance Corp., Honolulu, Hawaii | Hawaii Resort Industries, Inc., Honolulu, Hawaii | 4/23/84 | 11/20/61 |
| 20. | State Savings Company of Schuyler, Schuyler, Nebraska | Denver, Inc., Schuyler, Nebraska | 5/14/84 | 5/16/80 |
| 21. | Servco Financial Corp., Honolulu, Hawaii | Servco Pacific, Inc., Honolulu, Hawaii | 5/14/84 | 10/15/79 |
| 22. | Finance Factors, Ltd., Honolulu, Hawaii | Finance Enterprise, Ltd., Honolulu, Hawaii | 6/4/84 | 10/3/77 |
| 23. | Heritage Thrift and Loan Association, Brea, California | Centennial Beneficial Corporation, Orange, California [1] | 6/11/84 | 3/9/82 |
| 24. | Realty Finance, Inc., Hilo, Hawaii | Realty Investment Co., Ltd., Hilo, Hawaii | 6/25/84 | 4/12/70 |
| 25. | Paradise Finance, Inc., Honolulu, Hawaii | Aloha Corporation, Honolulu, Hawaii | 6/25/84 | 4/26/72 |
| 26. | Citicorp Industrial Bank (Now Citicorp Savings and Industrial Bank), Aurora, Colorado | Citicorp, New York, New York [1] | 7/23/84 | 5/26/82 |
| 27. | Citicorp Person-to-Person Colorado Springs Industrial Bank (Now Citicorp Savings and Industrial Bank of Colorado Springs), Colorado Springs, Colorado | Citicorp, New York, New York [1] | 7/23/84 | 5/26/82 |
| 28. | Citicorp Person-to-Person Lakewood Industrial Bank (Now Citicorp Savings and Industrial Bank of Southwest Plaza), Lakewood, Colorado | Citicorp, New York, New York [1] | 7/23/84 | 5/26/82 |
| 29. | Citicorp Person-to-Person Northglenn Industrial Bank (Now Citicorp Savings and Industrial Bank of Northglenn), Northglenn, Colorado | Citicorp, New York, New York [1] | 7/23/84 | 1/15/82 |
| 30. | Citicorp Person-to-Person Englewood Industrial Bank (Now Citicorp Savings and Industrial Bank of Littleton), Englewood, Colorado | Citicorp, New York, New York [1] | 7/23/84 | 5/26/82 |
| 31. | Citicorp Person-to-Person Fort Collins Industrial Bank (Now Citicorp Savings and Industrial Bank of Fort Collins), Fort Collins, Colorado | Citicorp, New York, New York [1] | 7/23/84 | 10/27/75 |
| 32. | Citicorp Person-to-Person Boulder Industrial Bank (Now Citicorp Savings and Industrial Bank of Boulder), Boulder, Colorado | Citicorp, New York, New York [1] | 7/23/84 | 10/26/82 |
| 33. | Citicorp Person-to-Person Denver Industrial Bank (Now Citicorp Savings and Industrial Bank of Denver), Denver, Colorado | Citicorp, New York, New York [1] | 7/23/84 | 5/26/82 |

[1] The institution is a registered bank holding company.



| | Bank | Parent Company | FDIC Insurance Granted | Date Acquired |
|---|---|---|---|---|
| 34. | Landmark Thrift & Loan, San Diego, California | Olympian Bancorp, San Diego, California [1] | 8/6/84 | 1/3/83 |
| 35. | Household Aurora Industrial Bank, Aurora, Colorado | Household Finance Corp., Prospect Heights, Illinois | 8/13/84 | 2/22/80 |
| 36. | Household Weld County Industrial Bank, Greeley, Colorado | Household Finance Corp., Prospect Heights, Illinois | 8/13/84 | 12/10/76 |
| 37. | Household Longmont Industrial Bank, Longmont, Colorado | Household Finance Corp., Prospect Heights, Illinois | 8/13/84 | 7/23/80 |
| 38. | Citicorp Person-to-Person Financial Center, Inc., Omaha, Nebraska | Citicorp, New York, New York [1] | 8/27/84 | 9/1/82 |
| 39. | Investors Thrift, Orange, California | Tomar Financial, Orange, California | 9/24/84 | 11/12/82 |
| 40. | Fireside Thrift Company, Redwood City, California | Teledyne, Inc., Los Angeles, California | 10/1/84 | 9/68 |
| 41. | Citizen Thrift and Loan Association, Irvine, California | Western Interstate Bancorp, Irvine, California | 10/29/84 | 11/21/80 |
| 42. | Sierra Thrift, Fresno, California | WKS, Inc., Fresno, California | 10/29/84 | 2/1/84 |
| 43. | Metropolitan Thrift & Loan, Oakland, California | MTB Corp., Oakland, California | 12/17/84 | 9/1/83 |
| 44. | Nevada First Thrift, Reno, Nevada | Nevada First Development Company, Reno, Nevada [1] | 12/17/84 | 7/31/84 |
| 54. | Parker Industrial Bank, Parker, Colorado | Douglas Bancorporation, Inc., Parker, Colorado [1] | 3/11/85 | 9/30/83 |

[1] The institution is a registered bank holding company.